THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1995 CUMULATIVE SUPPLEMENT

Volume 9

Chapters 53 through 57C

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 457 S.E.2d 524. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 9 contains the general laws of a permanent nature enacted by the General Assembly through the 1995 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1995 Regular Session affecting Chapters 53 through 57C of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 340, p. 364.
North Carolina Court of Appeals Reports through Volume 118, p. 737.
South Eastern Reporter 2nd Series through Volume 457, p. 524.
Federal Reporter 3rd Series through Volume 53, p. 349.
Federal Supplement through Volume 882, p. 1100.
Federal Rules Decisions through Volume 160, p. 664.
Bankruptcy Reports through Volume 181, p. 677.
Supreme Court Reporter through Volume 115, p. 2020.
North Carolina Law Review through Volume 73, p. 1760.
Wake Forest Law Review through Volume 30, p. 426.
Campbell Law Review through Volume 17, p. 163.
Duke Law Journal through Volume 44, p. 1049.
North Carolina Central Law Journal through Volume 21, p. 178.
Opinions of the Attorney General.

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ARTICLE 1.

Definitions.

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.

The following definitions shall be applied to the terms used in this Chapter:

(1) Bank. — The term "bank" shall be construed to mean any corporation, other than savings and loan associations, savings banks, industrial banks, and credit unions, receiving, soliciting or accepting money or its equivalent on deposit as a business.

(1a) Branch. — The term "branch" means an office of any bank in which deposits are received, monies are paid, and loans are made. Any of the functions or services authorized to be engaged in by a bank may be carried out in a branch.

(2) Demand Deposits. — The term "demand deposits" means all deposits, the payment of which can be legally required within 30 days.

(3) Insolvency. — The term "insolvency" means:

a. When a bank cannot meet its deposit liabilities as they become due in the regular course of business;

b. When the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors;

c. When its reserve shall fall under the amount required by this Chapter, and it shall fail to make good such reserve within 30 days after being required to do so by the Commissioner of Banks; or

d. Whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created.

(3a) Limited Service Facility. — The term "limited service facility" means an office of a bank in which deposits are received, monies are paid, or other duties and functions of a teller are performed. Loan applications shall be taken in a limited service facility but notes may not be executed nor loan proceeds disbursed in a limited service facility.

(4) Net Earnings. — The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.

(5) Practical Banker. — The term "practical banker" means an officer or employee of a bank actively engaged in performing duties in managing or supervising or assisting in managing or supervising the conducting of a banking business, including any such banker who is in a retired status from such duties.

(6) Surplus. — The term "surplus" means a fund created pursuant to the provisions of this Chapter by a bank from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.

(7) Time Deposits. — The term "time deposits" means all deposits, the payment of which cannot be legally required within 30 days.

(8) Undivided Profits. — The term "undivided profits" means the credit balance of the profit and loss account of any bank.

(9) Unimpaired Capital Fund. — The term "unimpaired capital fund" means the total of the amount of unimpaired common stock, preferred stock, surplus, undivided profits, reserve for contingencies and other capital reserves (excluding accrued dividends on preferred stock and limited life preferred stock), mandatory convertible instruments, allowance for possible loan losses, and the amount of capital debentures or notes, convertible or otherwise, having an average original maturity of at least seven years, which have been specifically designated as part of the bank's unimpaired capital fund by resolution duly adopted by the board of directors of the bank; provided, that upon payment of such capital debentures or notes or upon accumulation of funds in a sinking fund for amortization of such debentures or notes, unimpaired capital fund shall be reduced by the amount of such payment or accumulation. The terms and conditions of any issue of or prepayment of capital debentures or notes must have the prior written approval of the Commissioner of Banks affirming that in his opinion such issue or prepayment is in the best interest of the depositors, creditors and stockholders of the bank. (1921, c. 4, s. 1; C.S. s. 216(a); 1927, c. 47, s. 1; 1931, c. 243, s. 5; 1945, c. 743, s. 1; 1967, c. 789, s. 21; 1979, c. 483, s. 2; 1983, c. 214, s. 1; 1985, c. 677, s. 3; 1989, c. 187, s. 1; 1995, c. 129, s. 1.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added "or" to the end of subdivision (3)c.

ARTICLE 2.

Creation.

§ 53-12. Merger or consolidation of banks and savings associations.

(a) A bank may merge, consolidate with, or transfer its assets and liabilities to another bank or to a savings association, or a savings association may transfer its assets and liabilities to a bank. Before such merger or consolidation or transfer shall become effective, each bank or savings association concerned in such merger or consolidation or transfer shall file, with the Commissioner of Banks, certified copies of all proceedings had by its directors and stockholders, or in the case of a mutual savings association, its directors and membership. The proceedings of the stockholders or membership shall set forth that (i) holders of at least two-thirds of the stock of the bank voted in the affirmative on the proposition of merger or consolidation or, (ii) in the case of a stock or mutual savings association, such percentage of the stock or of the membership as the laws applicable to such institutions require, voted in the affirmative on the proposition of merger or consolidation. The proceedings of the stockholders or memberships shall also contain a complete copy of the agreement made and entered into between said banks or savings associations, with reference to such merger or consolidation or transfer. Upon the filing of the proceedings as required by this section, the Commissioner of Banks may make an investigation of each bank or savings association, or both, to determine whether the interests of the depositors, creditors, and stockholders or members of each bank or savings association are protected, and if such merger or consolidation is in the public interest, and that such merger or consolidation or transfer is made for legitimate purposes. The Commissioner's consent to or rejection of such merger or consolidation or transfer shall be based upon such investigation. No merger or consolidation or transfer shall be made without the consent of the Commissioner of Banks. The expenses of any investigation shall be paid by the banks or savings associations, or both, involved in the proposed merger or consolidation or transfer. Notice of such merger or consolidation or transfer shall be published once a week for four consecutive weeks before the same is to become effective, at the discretion of the Commissioner of Banks, in a newspaper published in the county in which each of said banks or savings associations, or both, is located. If no newspaper is published in such county, then the notice shall be published in a newspaper having a general circulation in such county. A certified copy of the notice shall be filed with the Commissioner of Banks. In case of either transfer or merger or consolidation, the rights of creditors shall be preserved unimpaired and the respective companies deemed to be in existence to preserve such rights for a period of three years. For the purposes of this section, the term "savings association" shall be construed to include a savings and loan association or a savings bank, whether organized under the laws of North Carolina or the United States.

(b) Unless otherwise required to be maintained, a bank may merge or otherwise consolidate into itself any subsidiary organized pursuant to G.S. 53-47, or acquired as a part of any merger or reorganization with another bank or bank holding company. (1921,

c. 4, s. 12; C.S., s. 217(k); 1931, c. 243, s. 5; 1967, c. 789, s. 4; 1981, c. 671, s. 1; 1995, c. 479, s. 1.)

Effect of Amendments. — The 1995 amendment, effective July 26, 1995, added "and savings associations" in the catchline of this section, and rewrote the text of this section.

§ 53-13. Merged or consolidated banks and savings associations deemed one bank or savings association.

In case of merger or consolidation when the agreement of merger or consolidation is made, and a duly certified copy thereof is filed with the Secretary of State, together with a certified copy of the approval of the Commissioner of Banks to such merger or consolidation, the parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such surviving company in the case of merger or in such new company in the case of consolidation, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; C.S., s. 217(l); 1931, c. 243, s. 5; 1981, c. 671, s. 2; 1995, c. 479, s. 2.)

Effect of Amendments. — The 1995 amendment, effective July 26, 1995, in the catchline added "and savings associations" and "or savings association"; and deleted "banks" preceding "parties thereto" in the first sentence.

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.

Whenever any bank, trust company, savings association, or savings bank, organized under the laws of North Carolina or the United States, and doing business in this State, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank, trust company, savings association, or savings bank doing business in this State, as provided by the laws of North Carolina or the United States, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring institution, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee institution or the consolidated or merged institution, and such latter institution shall be deemed substituted for and shall have all the rights and powers of the transferring institution. (1931, c. 207; 1941, c. 80; 1995, c. 479, s. 3.)

Effect of Amendments. — The 1995 amendment, effective July 26, 1995, twice substituted "bank, trust company, savings association, or savings bank" for "bank or trust company", twice substituted "United States" for "acts of Congress", substituted the first occurrence of "institution" for "bank or banks and/or trust companies" preceding "including the rights", substituted the second occurrence of "institution" for "bank" preceding "or the consolidated", and substituted the last three occurrences of "institution" for "bank or trust company".

§ 53-17.2. Conversion of savings association to a State bank.

(a) Any association, as defined in G.S. 54B-4, or any savings bank as defined in G.S. 54C-4(b), may convert to a State bank as provided in this section. As used in this section, the term "conversion" includes (i) a transaction in which a State bank assumes all or substantially all of the liabilities and purchases all or substantially all of the assets of an association or savings bank and (ii) any other transaction that results in a change of identity of an association or savings bank to a State bank. A transaction in which the resulting bank is a subsidiary or an affiliate of a bank holding company or bank which has been in existence for at least two years shall not be subject to the provisions of this section but shall be subject to the approval of the Commissioner of Banks.

(b) Upon a majority vote of its board of directors, any association or savings bank may apply to the Commissioner of Banks for permission to convert to a bank and for certification of appropriate amendments to its certificate of incorporation to effect the conversion. A mutual association or savings bank must also convert to a stock form of organization before completing conversion to a bank.

(c) The association or savings bank shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may recommend approval of the plan of conversion with or without amendment. The Commissioner of Banks shall recommend approval of the plan of conversion if upon examination and investigation the Commissioner finds that:

(1) The resulting bank will operate in a safe, sound, and prudent manner with adequate capital, liquidity, and earnings prospects;

(2) The directors, officers, and other managerial officials of the association or savings bank are qualified by character and financial responsibility to control and operate in a legal and proper manner the bank proposed to be formed as a result of the conversion;

(3) The interest of the depositors, the creditors, and the public generally will not be jeopardized by the proposed conversion; and

(4) The proposed name will not mislead the public as to the character or purpose of the resulting bank, and the proposed name is not the same as one already adopted or appropriated by an existing bank in this State or so similar as to be likely to mislead the public.

(d) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which may approve, modify, or disapprove any action taken or recommended by the Commissioner of Banks. The State Banking Commission may promulgate rules to govern conversions undertaken pursuant to this section. The requirements for a converting association or savings bank shall be no more stringent than those provided by rule or regulation applicable to other FDIC-insured commercial banks. The requirements for a converting association or savings bank shall be no less stringent than those provided by rule or regulation applicable to other FDIC-insured commercial banks, except as may be allowed during transition periods permitted by subdivisions (e)(4) and (h)(2) of this section.

(e) In the absence of the promulgation of rules under subsection (d), the conditions to be met for approval of the application for conversion should include the following:

(1) Condition. The applicant's general condition must reflect adequate capital, liquidity, reserves, earnings, and asset composition necessary for safe and sound operation of the resulting bank.

(2) Management. The management and the board of directors must be capable of supervising a sound banking operation and overseeing the changes that must be accomplished in the conversion from an association or savings bank to a bank.

(3) Public Convenience. The Commission must determine that the conversion will have a positive impact on the convenience of the public and will not substantially reduce the services available to the public in the market area.

(4) Transition. Within a reasonable time after the effective date of the conversion, the resulting bank must divest itself of all assets and liabilities that do not conform to State banking law or rules. The length of this transition period shall be determined by the Commissioner and shall be specified when the application for conversion is approved.

In evaluating each of these conditions, the Commission shall consider a comparison of the relevant financial ratios of the applicant with the average ratios of North Carolina banks of similar asset size. The Commission may not approve a conversion where the applicant presents an undue supervisory concern or has not been operated in a safe and sound manner.

(f) If the State Banking Commission approves the plan of conversion, then the association or savings bank shall submit the plan to the stockholders or members as provided in subsection (g). After approval of the plan of conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted pursuant to law and the association's or savings bank's approved plan of conversion.

(g) After lawful notice to the stockholders or members of the association or savings bank and full and fair disclosure of the plan of conversion, the plan must be approved by a majority of the total votes that stockholders or members of the association or savings bank are eligible and entitled to cast. The vote by the stockholders or members may be in person or by a proxy which has been executed within 45 days prior to the vote. Following the vote of the stockholders or members, the association or savings bank shall file with the Commissioner of Banks the results of the vote certified by an appropriate officer. The Commissioner of Banks shall then approve the requested conversion and the association or savings bank shall file with the Secretary of State amended articles of incorporation with the certificate of the Commissioner of Banks attached. The conversion to a bank shall be effective upon this filing.

(h) The Commissioner of Banks may authorize the resulting bank to do the following:

(1) Wind up any activities legally engaged in by the association or savings bank at the time of conversion but not permitted to State banks.

(2) Retain for a transitional period any assets and deposit liabilities legally held by the association or savings bank at the effective date of the conversion that may not be held by State banks.

The length, terms, and conditions of the transitional periods under subdivisions (1) and (2) are subject to the discretion of the Commissioner of Banks.

(i) Upon conversion of an association or savings bank to a bank, the legal existence of such institution does not terminate, and the resulting bank is a continuation of the former institution. The conversion shall be a mere change in identity or form of organization. All rights, liabilities, obligations, interest, and relations of whatever kind of the association or savings bank shall continue and remain in the resulting bank. Except as may be authorized during a transitional period by the Commissioner of Banks pursuant to subsection (h), a bank resulting from the conversion of an association or savings bank shall have only those rights, powers and duties which are authorized for banks by the laws of this State and the United States. All actions and legal proceedings to which the association or savings bank was a party prior to conversion shall be unaffected by the conversion and shall proceed as if the conversion had not taken place. (1989 (Reg. Sess., 1990), c. 845, s. 1; 1995, c. 142, s. 1.)

Effect of Amendments. — The 1995 amendment, effective June 1, 1995, inserted "or savings bank" following "association" throughout the section; inserted "or any savings bank as defined in G.S. 54C-4(b)" in the first sentence of subsection (a); deleted the former second sentence of subsection (a), which read "A mutual association must first convert to a stock association before applying for conversion to a bank as provided in this section"; in subsection (b) deleted "Any association" from the beginning, inserted "any association or savings bank" following "directors", and added the last sentence; in subsections (f) and (g) inserted "or members" following "stockholders"; in subsection (g) added "which has been executed within 45 days prior to the vote" to the end of the second sentence, deleted "of the association" following "conversion" in the last sentence; in subsection (h), in the first sentence, substituted "such institution" for "the association", substituted "former institution" for "association"; and made related and stylistic changes.

ARTICLE 3.

Dissolution and Liquidation.

§ 53-18. Voluntary liquidation.

A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this State by the affirmative votes of its stockholders owning two thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence 10 days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and secretary, shall be transmitted to the Commissioner of Banks for his approval. If the Commissioner of Banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the Commissioner of Banks until said Commissioner of Banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the Commissioner of Banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this Chapter. When the Commissioner of Banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the county in which such bank is located, or if no newspaper is published in such county, then in a newspaper having a general circulation in such county, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. Such notice shall be published once a week for four consecutive weeks. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Commissioner of Banks, and shall furnish such reports from time to time as may be called for by the Commissioner of Banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of Chapter 116B. Whenever the Commissioner of Banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the Commissioner of Banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and secretary, together with a copy of the contract of sale and transfer, shall be filed with the Commissioner of Banks. Whenever voluntary liquidation shall be approved by the Commissioner of Banks or the sale and transfer of the assets of any bank shall be approved by the Commissioner of Banks, a certified copy of such approval under seal of the Commissioner of Banks, filed in the office of the Secretary of State, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this Chapter and the general law relative to corporations. (1921, c. 4, s. 15; C.S., s. 218(a); 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5; 1979, 2nd Sess., c. 1311, s. 3; 1995, c. 129, s. 2.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted “secretary” for “cashier” in the second and eleventh sentences; in the sixth sentence deleted “city, town, or” preceding “county” and inserted “or if no newspaper is published in such county, then in a newspaper having general circulation in such county” following “located”; and added the seventh sentence.

§ 53-19. When Commissioner of Banks may take charge.

The Commissioner of Banks may forthwith take possession of the business and property of any bank to which this Chapter is applicable whenever it shall appear that such bank:

(1) Has violated its charter or any laws applicable thereto;
(2) Is conducting its business in an unauthorized or unsafe manner;
(3) Is in an unsafe or unsound condition to transact its business;
(4) Has an impairment of its capital stock;
(5) Has refused to pay its depositors in accordance with the terms on which such deposits were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold;
(6) Has become otherwise insolvent;
(7) Has neglected or refused to comply with the terms of a duly issued lawful order of the Commissioner of Banks;
(8) Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination of a duly appointed or authorized examiner of the Commissioner of Banks;
(9) Its officers have refused to be examined upon oath regarding its affairs; or
(10) Has made a voluntary assignment of its assets to trustees.

Such banks may resume business as provided in G.S. 53-37. (1911, c. 25, s. 4; 1921, c. 4, s. 16; C.S., ss. 218(b), 242; 1931, c. 243, s. 5; 1995, c. 129, s. 3.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added "or" to the end of subdivision (9).

§ 53-20. Liquidation of banks.

(a) When Commissioner of Banks to Take Possession. — Whenever any State bank shall neglect or refuse for a period of 60 days to make a report to the Commissioner of Banks, as he may demand, or shall, after demand under seal of the Commissioner of Banks, fail, neglect or refuse to comply with any of the rules, regulations or requirements of the State Banking Commission, or the provisions of the banking law, or if at any time the Commissioner of Banks shall find a bank subject to the supervision of the Commissioner of Banks, in an insolvent, unsafe or unsound condition to transact the business for which it was organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the Commissioner of Banks, or any of his assistants, then, in either of such events, the Commissioner of Banks, or any duly authorized agent of the Commissioner of Banks appointed under seal of the Commissioner of Banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the superior court under the provisions of this section.

(b) Directors May Act. — Any bank may place its assets and business under the control of the Commissioner of Banks for liquidation by a resolution of a majority of its directors upon notice to the said Commissioner of Banks, and, upon taking possession of said bank, the Commissioner of Banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the Commissioner of Banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the Commissioner of Banks and subject to liquidation hereunder.

(c) Notice of Seizure to Court Bar to Attachment, etc.; Transfers Void. — When the Commissioner of Banks, or duly appointed agent, shall take possession of any bank under subsections (a) or (b) hereof he shall, within 48 hours, file with the clerk of the superior court in the county where said bank is located, a notice of his action which shall state the reason therefor; and such notice shall be deemed the equivalent of a summons and complaint against said bank in an action in the superior court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the Commissioner of Banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the Commissioner of Banks shall be substituted in place of the bank in all actions in the State or federal courts, pending at the time of the exercise of such authority.

(d) Notice to Banks; Corporations and Persons Holding Assets; Liens Not to Accrue. — On taking possession of the assets and business of any bank, the Commissioner of Banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(e) Permission to Resume Business. — After the Commissioner of Banks has taken possession of any bank, such bank may resume business as provided in G.S. 53-37.

(f) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc.; Appeal. — Whenever any bank, of whose assets and business the Commissioner of Banks has taken possession as aforesaid, except where possession is taken under subsection (b) hereof, shall deem itself aggrieved thereby, it may, at any time within 10 days after the filing of the notice with the clerk of the superior court, file an answer to said notice and may also upon notice to the Commissioner of Banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said Commissioner of Banks, and the said judge may cite the said Commissioner of Banks to show cause within 10 days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the Commissioner of Banks. If the judge shall enjoin further action of the Commissioner of Banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the Commissioner of Banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(g) Collection of Debts and Claims; Sale or Compromise of Debts and Claims; Commissioner Succeeds to All Property of Bank. — Upon taking possession of the assets and business of any bank by the Commissioner of Banks, the Commissioner of Banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner of Banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority.

Upon taking possession of any bank under this section, the Commissioner of Banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said Commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested. The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assembly.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina Commissioner of Banks, and/or the duly appointed liquidating agent.

(h) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty. — Upon taking possession of any bank, the Commissioner of Banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the superior court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said Commissioner of Banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the Commissioner of Banks, which in no case shall be less than five thousand dollars ($5,000). Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the Commissioner of Banks, he may, in his discretion with the approval of the State Banking Commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the Banking Act of 1933, enacted by Congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the Commissioner of Banks, may serve as such agent without giving the bond required under all other circumstances in this subsection. Also, in the event of such appointment, the Commissioner of Banks shall thereafter be forever relieved from any and all responsibility and liability in respect to the liquidation of such bank.

(i) Inventory Necessary. — Within 30 days after the filing of the notice of the taking possession of any bank in the office of the clerk of the superior court, the Commissioner of Banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the superior court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(j) Notice and Time for Filing Claims; Copies Mailed. — Notice shall be given by advertisement once a week for four consecutive weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to present the same to the Commissioner of Banks at the office of the bank, and within the time to be specified in the notice, not less, however, than 90 days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the Commissioner of Banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(k) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim. — If the Commissioner of Banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the clerk of the superior court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the Commissioner of Banks in the proper court of the county in which the bank is located within 90 days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the Commissioner of Banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the Commissioner of Banks, or duly appointed agent, and the Commissioner of Banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the Commissioner of Banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within 10 days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(*l*) List of Claims Presented and Deposits; Copies; Proviso. — Upon the expiration of the time fixed for presentation of claims, the Commissioner of Banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the State Treasurer. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the Commissioner of Banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(m) Declaration of Dividends; Order of Preference in Distribution. — At any time after the expiration of the date fixed by the Commissioner of Banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the Commissioner of Banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten per centum (10%) of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder:

(1) Taxes and fees due the Commissioner of Banks for examination or other services;
(2) Wages and salaries due officers and employees of the bank, for a period of not more than four months;
(3) Expenses of liquidation;
(4) Certified checks and cashier's checks in the hands of a third party as a holder for value and the amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank;
(5) Amounts due creditors other than stockholders.

The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the superior court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(n) Deposit of Funds Collected. — All funds collected by the Commissioner of Banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the Commissioner of Banks. The payment of interest on the net average of such sums on deposit shall be controlled by the Governor and Council of State, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(o) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation. — The Commissioner of Banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(p) Unclaimed Dividends Held in Trust. — The unclaimed dividends remaining in the hands of the Commissioner of Banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the Commissioner of Banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the Commissioner of Banks. After the Commissioner of Banks has held the unclaimed dividends held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of 10 years, he is hereby given the authority to pay the principal amount of such unclaimed dividends to the State Treasurer, to be held by the State Treasurer without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the State Treasurer, the Commissioner of Banks shall be fully discharged from all further liability therefor.

(q) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the Commissioner of Banks are not more than sufficient to pay the depositors and creditors of said bank, the Commissioner of Banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the clerk of the superior court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank.

(r) Action by Commissioner of Banks after Full Settlement. — Whenever the Commissioner of Banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four consecutive weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the Commissioner of Banks all the assets of said bank then remaining in his hands; and the Commissioner of Banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The Commissioner of Banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semiannually a report of all transactions with the superior court of the county in which the bank is located, and with the Commissioner of Banks, and shall be allowed for such services such fees not in excess of five percent (5%), as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the Commissioner of Banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of court or by action of the stockholders, distribution shall be provided for.

(s) Annual Report of Commissioner of Banks; Items in Report of. — The Commissioner of Banks shall file, as a part of his annual report to the Governor, a list of the names of the banks so taken possession of and liquidated; and the Commissioner of Banks shall, from time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the Commissioner of Banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the Commissioner of Banks under the provisions of this section.

(t) Compensation of Commissioner of Banks. — The Commissioner of Banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the Commissioner of Banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the Commissioner of Banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(u) Exclusive Methods of Liquidation. — No bank created under the Banking Act or the Industrial Banking Act, and under the supervision of the Commissioner of Banks, shall be liquidated in any other way or manner than that provided herein.

(v) Application of Act. — The applicable provisions of this section as enacted by Chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(w) Liquidation by Commissioner of Banks of All Banks in Receivership Required. — On and after the first day of January, 1936, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this Chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said Banking Commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection (o) of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated.

(x) Unlocated Depositor. — Any funds due a known but unlocated person shall be disposed in accordance with Chapter 116B of the General Statutes, except where the provisions of this Chapter specifically provide otherwise. (1921, c. 4, s. 17; C.S., s. 218(c); 1927, c. 113; 1931, c. 243, s. 5; cc. 385, 405; 1933, c. 175, s. 2; c. 546; 1935, c. 81, s. 4; c. 231, s. 1; c. 277; 1939, c. 91; 1947, c. 621, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 4; 1991, c. 677, s. 1; 1995, c. 129, ss. 4, 5.)

Effect of Amendments. — Session Laws 1995, c. 129, ss. 4 and 5, effective May 31, 1995, substituted "once a week for four consecutive weeks" for "for four weeks" in the first sentence of subsection (j); and inserted "consecutive" following "four" in the first sentence of subsection (r).

§ 53-26. Petition for new trustee; service upon parties interested.

In all cases of such insolvency and liquidation mentioned in G.S. 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in a newspaper published in the county, or if no newspaper is published in the county where such application is made, then in a newspaper having a general circulation in such county, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than 30 days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2; 1995, c. 129, s. 6.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "a" for "some" following "the publication in"; deleted "in some adjoining county" preceding "if no newspaper"; and inserted "then in a newspaper having a general circulation in such county" following "application is made".

ARTICLE 4.

Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen.

Whenever the Commissioner of Banks has taken in possession any bank, such bank may, with the consent of the Commissioner of Banks, resume business upon such terms and conditions as may be approved by the State Banking Commission. When such banks have been taken in possession under the provisions of G.S. 53-20, subsections (a) or (b), such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of G.S. 53-20, subsection (c): Provided, however, no bank or banking institution which has been taken in possession by the Commissioner of Banks under the provisions of the State banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

(1) The bank has been completely restored to solvency;
(2) The capital stock, if impaired, has been entirely restored in cash; or
(3) It shall clearly appear to the Commissioner of Banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1921, c. 4, s. 16; C.S., s. 218(q); 1927, c. 113, s. 1; 1931, c. 243, s. 5; c. 388, s. 1; 1939, c. 91, s. 2; 1995, c. 129, s. 7.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added "or" at the end of subdivision (2).

ARTICLE 5.

Stockholders.

§ 53-42. Impairment of capital; assessments, etc.

The Commissioner of Banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within 60 days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in G.S. 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon 30 days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the county where the bank is located, and if none therein, a newspaper having general circulation in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Commissioner of Banks, the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock. (Ex. Sess. 1921, c. 56, s. 3; C.S., s. 219(f); 1925, c. 117; 1931, c. 243, s. 5; 1959, c. 157; 1995, c. 129, s. 8.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, in the second sentence, substituted "county" for "place" preceding "where the bank" and substituted "having general circulation" for "circulating" following "therein, a newspaper".

ARTICLE 6.

Powers and Duties.

§ 53-43. General powers.

In addition to the powers conferred by law upon private corporations, banks shall have the power:

(1) To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, and by loaning money on personal security or real and personal property. Such corporation at the time of making loans may not take and receive interest or discounts in advance where the effective rates of interest or discounts collected shall exceed the maximum rates of interest provided under this section, G.S. 24-1.1 and 24-1.2 if such interest or discount had not been collected in advance.

(2) To adopt regulations for the government of the corporation not inconsistent with the Constitution and laws of this State.

(3) To purchase, hold, and convey real estate for the following purposes:

a. Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other spaces to rent as a source of income, which investment shall not exceed fifty percent (50%) of its unimpaired capital fund: Provided, that this fifty percent (50%) limitation shall not apply to banking houses, furniture and fixtures leased for the purposes set forth in this subdivision. Provided, further, that if any bank shall demonstrate to the satisfaction of the Commissioner of Banks that an investment of more than fifty percent (50%) of its unimpaired capital fund in its banking houses, furniture and fixtures, would promote the convenience of the general public in transacting its banking business and would not adversely affect the financial stability of the bank, the Commissioner of Banks may, in his discretion, authorize any bank to invest more than fifty percent (50%) of its unimpaired capital fund in its banking houses, furniture and fixtures.

b. Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

c. Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subdivision shall be sold by such bank within five years after it is acquired unless, upon application by the board of directors, the Commissioner of Banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this Chapter, are hereby repealed.

(4) Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the federal home loan banks or the Home Owner's Loan Corporation.

Any provision in conflict with this subdivision contained in the articles of incorporation heretofore issued to any banking corporation is hereby revoked.

(5) Repealed by Session Laws 1989, c. 187, s. 5.

(6) Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the State Banking Commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the

sinking funds of the State of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum (125%) of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The Banking Commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said Commission as well as by this paragraph.

(7) To issue, advise and confirm letters of credit authorizing the beneficiaries thereof to draw upon the institution or its correspondents.

(8) To receive money for transmission.

(9) To become a member of a clearinghouse association and to pledge assets required for its qualification.

(10) To provide for the performance of bank service corporation services, such as data processing services and bookkeeping, subject to such rules and regulations as may be adopted by the State Banking Commission. (1921, c. 4, s. 26; 1923, c. 148, s. 5; C.S., s. 220(a); Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1; c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; 1955, c. 590; 1961, c. 954; 1967, c. 789, s. 6; 1969, c. 541, s. 8; c. 1303, ss. 8, 9; 1979, c. 483, s. 4; 1981, c. 671, s. 7; 1983, c. 214, s. 2; 1989, c. 187, s. 5; 1995, c. 129, s. 9.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "five years" for "one year" in subdivision (3)c.

§ 53-46. Limitations on investments in securities.

The investment in any bonds or other debt obligations of any one firm, individual, or corporation, unless it be the obligations of the United States, or agency thereof, or other obligations guaranteed by the United States Government, State of North Carolina, or other state of the United States, or other political subdivision of the State of North Carolina, or other state of the United States in which the bank maintains a branch, shall at no time exceed fifty thousand dollars ($50,000) plus ten percent (10%) of all amounts in excess of two hundred fifty thousand dollars ($250,000) of the bank's unimpaired capital fund. (1921, c. 4, s. 27; C.S., s. 220(b); 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186; 1967, c. 789, s. 8; 1979, c. 483, s. 5; 1995, c. 129, s. 10.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote this section.

§ 53-46.1. Investments in mutual funds.

Subject to rules adopted by the Banking Commission, a bank may invest a portion of its unimpaired capital in mutual funds. Any limitation imposed by rule on the amount of such investment shall be in addition to a bank's limitations on investment in stocks provided in G.S. 53-47. (1995, c. 129, s. 11.)

Editor's Note. — Session Laws 1995, c. 129, s. 43, made this section effective upon ratification. The Act was ratifed May 31, 1995.

§ 53-47. Limitations on investment in stocks.

(a) In addition to any powers or investments authorized by any other section of this Chapter, a bank may invest in the capital stock or other securities of any other state, national or foreign bank or trust company, and in any other industrial bank, savings bank, Morris Plan bank, savings and loan association, bankers' bank or other deposit taking entity chartered or existing under any federal, state, or foreign law including, but not limited to, the capital stock of clearing corporations defined in G.S. 25-8-102(3), the capital stock or other securities of central reserve banks whose capital stock exceeds one million dollars ($1,000,000) and the capital stock of an Edge or Agreement corporation. As used in this Chapter, the term "bankers' bank" means an insured depository financial institution, organized and chartered to do business exclusively with other banks and savings institutions, and the stock of which, or the stock of the holding company which controls such bank, is owned exclusively (except to the extent directors' qualifying shares are required by law) by banks or savings institutions. To constitute a central reserve bank as contemplated by this Chapter, at least fifty percent (50%) of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the "Edge Act", (12 U.S.C. § 611 et seq.) shall at no time exceed ten percent (10%) of the paid-in capital and permanent surplus of the bank making the investment.

(b) A bank may invest, without limitation, in a corporation, firm, partnership, or company:

(1) Which is a bank operating subsidiary, or

(2) To protect the bank from loss.

(c) In addition to the foregoing, upon 30 days prior written notice to the Commissioner of Banks, providing such detail as the Commissioner may require, a bank may invest, in the aggregate, up to seventy-five percent (75%) of its unimpaired capital fund in the stock or assets of other corporations, firms, partnerships, or companies which are:

(1) Primarily engaging in activities permissible for national banks or bank holding companies under applicable laws, rules, regulations or orders;

(2) Primarily engaging in activities of a financial nature, including the transmission or processing of information or data relating to such activities. For the purpose of this subsection, activities of a financial nature shall include, but not be limited to, all forms of securities activities, including underwriting, distribution, and brokerage, together with such other activities as the Commissioner of Banks shall determine by regulation or order;

(3) Engaging in any other activity approved by the Commissioner of Banks.

(d) Any state or national bank subsidiary which engages in an activity subject to licensure and/or regulation under other than Chapter 53 of the General Statutes shall be subject to licensure and/or regulation on a basis that does not arbitrarily discriminate by the appropriate regulatory agency which licenses and/or regulates nonbanks which engage in the same activity.

(e) Unless otherwise notified by the Commissioner within 30 days following receipt of the written notice, a bank may complete its investment in the stock or assets of the other corporation, firm, partnership, or company, or commence a new activity through an existing subsidiary. The Commissioner may extend the 30-day period if the Commissioner determines that the proposed investment or activity raises issues which require additional information or additional time for analysis. If the 30-day period is extended, the bank may proceed with respect to the proposed investment or activity only upon written approval of the Commissioner of Banks.

(f) The Commissioner of Banks shall monitor the impact of investment activities of banks under this section on the safety and soundness of such banks. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the stocks, and if not so disposed of, they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the Commissioner of Banks if in the Commissioner's judgment it is for the best interest of the bank that such extension be granted; provided that the limitations imposed in this section on the ownership of stock in or securities of corporations are suspended only to the extent that any bank operating under the supervision of the Commissioner of Banks may subscribe for and purchase shares of stock in or debentures, bonds, or other types of securities of any corporation organized under the laws of the United States for the purposes of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; C.S., s. 220(c); 1931, c. 243, s. 5; 1935, c. 81, s. 3; 1973, c. 497, s. 7; 1983, c. 214, s. 3; 1991, c. 677, s. 2; 1995, c. 417, s. 1.)

Effect of Amendments. — The 1995 amendment, effective July 11, 1995, rewrote this section.

§ 53-54. Transactions not performed during banking hours.

Nothing in any law of this State shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this State, because done or performed during any time other than regular banking hours. Nothing herein shall be construed to require a bank doing business in this State to be open when it may otherwise lawfully be closed or to prohibit a bank from conducting a transaction at times other than its regularly scheduled hours of operation. (1921, c. 4, s. 35; C.S., s. 220(j); 1995, c. 129, s. 12.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, deleted language from the end of the present first sentence regarding a bank not being compelled to remain open after hours on Saturday or holidays, and added the present second sentence.

§ 53-62. Establishment of branches; limited service facilities; and off-premises customer-bank communications terminals.

(a) The word "capital" as used in this section means capital stock and unimpaired surplus.

(b) A bank doing business under this Chapter may establish branches or limited service facilities within this State after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or limited service facility will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or limited service facility and of the existing bank or banks in said community.

(c)(1) A branch or limited service facility of a bank shall be operated as a branch or office of and under the name of the bank, and under the control and direction of the board of directors and executive officers of the bank. The board of directors of the bank shall elect such officers as may be required to properly conduct the business of any branch or limited service facility.

(2) The Commissioner of Banks shall not authorize the establishment of a branch until he is satisfied that the applicant bank has sufficient capital to maintain a minimum capital to asset ratio as the Commissioner of Banks, in his discretion, may require. In determining such ratio the Commissioner of Banks shall give due consideration to (i) the amount of capital required to support the bank's projected

growth, (ii) the bank's earnings history and projected earnings, (iii) the quality of the bank's assets, (iv) compliance with the fixed asset limitation contained in G.S. 53-43(3), and (v) the business experience and reputation of bank management.

(3) The Commissioner of Banks may, on written application by a bank, in his discretion authorize the bank to establish a limited service facility after considering the criteria and making the findings required in subsection (b).

(d) A limited service facility, upon written request to the Commissioner of Banks, and after meeting the requirements of subsection (c) may convert to a branch. If branch status is granted then the branch shall be subject to all of the conditions and requirements of that type of banking office.

Upon 30 days written notice to the Commissioner of Banks, a bank may discontinue any limited service facility operation; provided, however, if a limited service facility has within five years preceding the proposed closing date been a branch of any bank, it shall comply with the requirements of subsection (e) below before closing.

(d1) Subject to such rules and regulations as may be prescribed by the State Banking Commission with regard to their use, maintenance and supervision, any bank may establish off the premises of any principal office, branch or limited service facility a customer-bank communications terminal, point-of-sale terminal, automated teller machine, automated banking facility or other direct or remote information-processing device or machine, whether manned or unmanned, through or by means of which information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise, to or from a bank or other nonbank terminal; and the establishment and use of such a device or machine shall not be deemed a branch or limited service facility, and the capital requirements and standards for approval of a branch or limited service facility, all as set forth in subsections (b) and (c) above, shall not be applicable to the establishment of any such off-premises terminal device or machine; provided, however, that no bank, savings and loan association, savings bank, credit union or any other financial institution which is not domiciled in North Carolina may establish in North Carolina any information processing device or machine described in this subsection.

(e) A bank may, upon resolution by the board of directors, discontinue a branch office subject to the following:

(1) The bank shall notify the Commissioner in writing of its intent to close a branch not later than 90 days prior to the proposed closing date. Such notice shall include a detailed statement of the reasons for the decision to close a branch and statistical or other information in support of such reasons.

(2) The bank shall provide a notice of its intent to close a branch to its customers. Such notice shall be posted in a conspicuous manner on the branch premises for a period of 30 days prior to the proposed closing date, and shall either be included in at least one of any regular account statements mailed to customers of such branch, or in a separate mailing to such customers. The later notice shall be given at least 90 days prior to the proposed closing date.

No branch shall be closed until approved by the Commissioner of Banks, provided, however, the consolidation of two or more branches into a single location in the same vicinity shall not be considered a closure subject to the provisions of this subsection.

(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C.S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; 1953, c. 1209, ss. 2, 5; 1963, c. 793, s. 3; 1967, c. 789, s. 11; 1975, cc. 553, 850; 1983, c. 214, s. 5; 1989, c. 187, s. 7; 1995, c. 129, s. 13.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote subsection (e).

§ 53-63. Unlawful issuing of certificate of deposit.

It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money. Any officer or employee of any bank violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1921, c. 4, s. 44; C.S., s. 220(s); 1993, c. 539, s. 418; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 129, s. 14.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, deleted "nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock" from the end of the first sentence.

§ 53-64. Loans secured by bank's own stock or stock of parent bank holding company.

(a) It shall be lawful for a bank to make a loan secured by the pledge of its own shares of stock or the stock of its parent holding company; provided that whenever any bank shall exercise its security interest in the shares of the bank or its parent holding company upon a loan default or other transfer, it shall dispose of all of such shares of stock within a period of six months. If such stock has not been disposed of within six months, the same shall be charged to profit and loss and no longer carried as an asset of the bank. The Commissioner may extend the six-month period not to exceed an additional six months.

(b) A bank may not make a loan to finance the purchase of or to carry its stock or the stock of its parent holding company. For purposes of this subsection, the phrase "to carry" shall have the meaning set forth in 12 C.F.R. Part 221, by the Board of Governors of the Federal Reserve System.

(c) A bank may not purchase any portion of its shares of stock, nor the stock of its parent holding company, unless the same is purchased or pledged to the bank to prevent a loss upon a debt previously contracted in good faith. In the event the bank shall become the owner of its shares, or those of its parent holding company, the bank shall dispose of the same as provided in subsection (a) of this section. (1921, c. 4, s. 45; C.S., s. 220(t); 1927, c. 47, s. 9; 1983, c. 214, s. 6; 1995, c. 296, s. 1.)

Effect of Amendments. — The 1995 amendment, effective June 20, 1995, substituted "Loans secured by" for "Unlawful to loan on" in the catchline of this section, and rewrote the text of this section.

§ 53-77.1A. Days and hours of operation.

Except as provided in G.S. 53-77.2A, a bank as defined in G.S. 53-1 or G.S. 53-136, including national banking associations and federal reserve banks, or any branch or limited service facility of the foregoing located in this State, may operate on such days and during such hours as the board of directors shall designate. (1989, c. 187, s. 10; 1995, c. 129, s. 15.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote this section.

ARTICLE 7.

Officers and Directors.

§ 53-78. Appointment of executive and loan committees by directors.

The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or bylaws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, except that the executive committee or committees shall meet at least once during each month in which there is no meeting of the board of directors, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe.

The board of directors may appoint, in addition to the executive committee or committees, a general loan committee, the membership of which shall include at least three directors and such officers of the bank as may be appointed, with such duties and powers with respect to making loans and investments as are defined in the bylaws or by resolution of the board of directors, the members of such general loan committee to serve until their successors are appointed. Such general loan committee, if appointed, shall meet as often as the bylaws or resolution of the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all such loans and investments as may be required by the bylaws or by resolution of the board of directors to be submitted to the general loan committee. The board of directors of any bank, which has branches, may appoint, in addition to a general loan committee, a loan committee for the parent bank and for any branch, each of which committees shall include at least three members who are officers or members of the local advisory board for such parent bank or branch, with such duties and powers with respect to approving or disapproving loans and investments as may be defined in the bylaws or by resolution of the board of directors, and under such rules and regulations as the board of directors may prescribe. Such loans and investments as are authorized or approved by a general loan committee or either of the other loan committees hereinabove provided for may, but need not, be approved or disapproved by the executive committee or committees. All loans and investments made, however, shall be authorized or approved by either the executive committee or committees, a general loan committee, or one of the other loan committees herein provided for. (1921, c. 4, s. 49; C.S., s. 221(a); 1951, c. 167, s. 1; 1989, c. 187, s. 13; 1995, c. 129, s. 16.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "of the local advisory board" for "of the board of managers" in the third sentence of the second paragraph.

§ 53-91: Repealed by Session Laws 1995, c. 129, s. 17, effective May 31, 1995.

§ 53-91.2. Loans to executive officers.

No bank may extend credit to any of its executive officers nor a firm or partnership of which such executive officer is a member, nor a company in which such executive officer owns a controlling interest, unless the extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions by the bank with persons who are not employed by the bank, and provided further that the extension of credit does not involve more than the normal risk of repayment. For the purposes of this section, the term "executive officer" shall mean an officer who has authority to participate in major policy-making functions of the bank. Provided further, the maximum amount of such loans shall be that as prescribed by applicable federal banking regulations. (1995, c. 129, s. 18.)

Editor's Note. — Session Laws 1995, c. 129, s. 43, made this section effective upon ratification. The Act was ratifed May 31, 1995.

§ 53-91.3. Directors defined; appointment of advisory directors.

(a) Unless otherwise expressly provided, reference to "director" or "board of directors" shall mean a director of the banking corporation as elected by the shareholders pursuant to North Carolina corporation law.

(b) The board of directors so elected by the shareholders may, consistent with a bank's articles of incorporation or bylaws, appoint advisory directors to perform such duties as prescribed by the board with respect to local offices and branches of any bank chartered under Chapter 53 of the General Statutes. (1995, c. 129, s. 18.)

Editor's Note. — Session Laws 1995, c. 129, s. 43, made this section effective upon ratification. The Act was ratifed May 31, 1995.

ARTICLE 8.

Commissioner of Banks and State Banking Commission.

§ 53-92. (Applicable January 1, 1997) Appointment of Commissioner of Banks; State Banking Commission.

(a) On or before April 1, 1983, and quadrennially thereafter, the Governor shall appoint a Commissioner of Banks subject to confirmation by the General Assembly by joint resolution. The name of the Commissioner of Banks shall be submitted to the General Assembly on or before February 1, of the year in which the term of his office begins. The term of office for the Commissioner of Banks shall be four years. In case of a vacancy in the office of Commissioner of Banks for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the Commissioner of Banks shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) The State Banking Commission, which has heretofore been created, shall consist of the State Treasurer, who shall serve as an ex officio member thereof, 12 members appointed by the Governor, and two members appointed by the General Assembly under G.S. 120-121, one of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives. The Governor shall appoint five practical bankers and seven persons selected primarily as representatives of the borrowing public. The person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be a practical banker. The person appointed by the General Assembly upon the recommendation of the Speaker of the House shall be a person selected primarily as a representative of the borrowing public. The persons selected primarily as representatives of the borrowing public shall not be employees or directors of any financial institution nor shall they have any interest in any regulated financial institution other than as a result of being a depositor or borrower. Under this section, no person shall be considered to have an interest in a financial institution whose interest in any financial institution does not exceed one-half of one percent (½ of 1%) of the capital stock of that financial institution. These members of the Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. No person shall serve on the Commission for more than two complete consecutive terms. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the person appointing them, for terms of four years each. Any vacancy occurring in the membership of the Commission shall be filled by the appropriate appointing officer for the unexpired term, except that vacancies among members appointed by the General Assembly shall be filled in accordance with G.S. 120-122. The appointed members of the Commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission. This compensation shall be paid from the fees collected from the examination of banks as provided by law.

(c) The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any State banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

A quorum shall consist of a majority of the total membership of the Banking Commission. A majority vote of the members qualified with respect to a matter under review present at that meeting shall constitute valid action of the Banking Commission. The State Treasurer and all disqualified members who are present shall be counted to determine whether a quorum is present at a meeting.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

(d) The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State; any party to a proceeding before the Banking Commission may, within 20 days after final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved. The cause shall be entitled "State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)." It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In the event of an appeal the Commissioner shall certify the record to the Clerk of Superior Court of Wake County within 15 days thereafter. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372; 1953, c. 1209, ss. 4, 6; 1961, c. 547, s. 2; 1967, c. 789, s. 16; 1969, c. 844, s. 6; c. 920; 1979, c. 478, s.

§ 53-92 has a delayed applicability date. See notes.

1; 1981, c. 884, s. 1; 1983, c. 328, ss. 1, 3; 1985, c. 318; 1989, c. 781, s. 41.1; 1995, c. 490, s. 9.)

For this section as applicable until January 1, 1997, see the main volume.

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment added the subsection (a) through (d) designations; and added "Pro Tempore" in the first and third sentences of subsection (b). For the applicability of this amendment, see Editor's note.

§ 53-92.1. Commission bound by requirements imposed on Commissioner as to certification of new banks, establishment of branches, etc.

Notwithstanding any other provisions of this Chapter, the State Banking Commission, in the exercise of its authority to review the action of the Commissioner of Banks, shall be bound by the requirements, conditions and limitations imposed in this Chapter on the Commissioner as to the certification of new banks, establishment of branches or limited service facilities, or any other matters which may properly come before the Commissioner for review. Notwithstanding any other provision of law, members of the Commission may act on any matter before the Commission, provided however, a member may not vote on an application or other proceeding involving an institution in which the member has a financial interest or with which the member is affiliated. (1963, c. 793, s. 4; 1995, c. 129, s. 19; c. 267, ss. 1, 1.1.)

Effect of Amendments. — Session Laws 1995, c. 129, s. 19, effective May 31, 1995, substituted "limited service facilities" for "teller's windows" at the end of this section.

Session Laws 1995, c. 267, s. 1.1, effective June 15, 1995, repealed the amendment by Session Laws 1995, c. 129.

Session Laws 1995, c. 267, s. 1, effective June 15, 1995, at the end of the first sentence substituted the language beginning "the Commissioner as to the certification" and ending "before the Commissioner for review" for "said Commissioner as to the certification of new banks or the establishments of branch banks or teller's windows", and added the last sentence.

§ 53-93.1. Deputy commissioner.

The Commissioner of Banks shall appoint, with approval of the Governor, and may remove at his discretion a deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner of Banks, or in case the office of Commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner of Banks.

Irrespective of the conditions under which the deputy commissioner may exercise the powers and perform the duties of the Commissioner of Banks, pursuant to the preceding paragraph, such deputy commissioner, in addition thereto, is hereby authorized and empowered at any and all times, at the discretion of the Commissioner of Banks, to perform such duties and exercise such powers of the Commissioner of Banks in the name of and on behalf of the Commissioner as the Commissioner, in his discretion, may direct. (1959, c. 273; 1983, c. 717, s. 8; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1989, c. 752, s. 39(c); 1995, c. 129, s. 20.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, deleted the former last sentence, which read "This section is not to be construed to modify the provisions of G.S. 53-97."

§ 53-99. Official records.

(a) The Commissioner of Banks shall keep a record in his office of his official acts, rulings, and transactions which, except as hereinafter provided, shall be open to inspection, examination and copying by any person.

(b) Notwithstanding any laws to the contrary, the following records of the Commissioner of Banks shall be confidential and shall not be disclosed or be subject to public inspection:

(1) Records compiled during or in connection with an examination, audit or investigation of any bank, banking office, bank holding company or its nonbank subsidiary, or trust department which operates or has applied to operate under the provisions of this Chapter;

(2) Records containing information compiled in preparation or anticipation of litigation, examination, audit or investigation;

(3) Records containing the names of any borrowers from a bank or revealing the collateral given by any such borrower: Provided, however, that every report of insider transactions made by a bank which report is required to be filed with the appropriate State or federal regulatory agency by either State or federal statute or regulation shall be filed with the Commissioner of Banks in a form prescribed by him and shall be open to inspection, examination and copying by any person;

(4) Records prepared during or as a result of an examination, audit or investigation of any bank, bank affiliate, bank holding company or its nonbank subsidiary, data service center or banking practice by an agency of the United States, or jointly by such agency and the Commissioner of Banks, if such records would be confidential under federal law or regulation;

(4a) Records prepared during or as a result of an examination, audit or investigation of any bank, bank affiliate, bank holding company or its nonbank subsidiary, data service center or banking practice by a regulatory agency of jurisdiction of the region defined in G.S. 53-210(11) if these records would be confidential under that jurisdiction's law or regulation;

(5) Records of information and reports submitted by banks to federal regulatory agencies, if such records would be confidential under federal law or regulation;

(6) Records of complaints from the public received by the banking department and concerning banks under its supervision if such complaints would or could result in an investigation;

(7) Records of examinations and investigations of consumer finance licensees;

(7a) Records of examinations and investigations of licensees under the Sale of Checks Act, Article 16 of this Chapter;

(7b) Records of examinations and investigations of registrants under the Mortgage Bankers and Brokers Act, Article 19 of this Chapter;

(7c) Records of applications and investigations of registrants under the Refund Anticipation Loan Act, Article 20 of this Chapter;

(8) Records of pre-need burial contracts maintained pursuant to Article 13B of Chapter 90 of the General Statutes including investigations of such contracts and related credit inquiries;

(9) Any letters, reports, memoranda, recordings, charts, or other documents which would disclose any information set forth in any of the confidential records referred to in subdivisions (1) through (8).

(c) Notwithstanding the provisions of subsection (b), the Commissioner of Banks may, by written agreement with any state or federal regulatory agency, share with that agency any confidential information set out in subsection (b) on the condition that the information shared shall be treated as confidential under the applicable laws and regulations governing the recipient agency.

(d) Nothing in this section of the law shall prohibit a bank, upon approval of the Commissioner of Banks, from disclosing to an insurance carrier, for the purpose of obtaining insurance coverage required by Chapter 53 of the General Statutes, the bank's regulatory rating prepared by the Commissioner's office. Provided however, the insurance underwriter must agree in writing to maintain the confidentiality of such information and to not disclose the same in any manner whatsoever. (1931, c. 243, s. 10; 1977, 2nd Sess., c. 1181, s. 2; 1979, c. 255, s. 1; 1989, c. 9, s. 1; 1989 (Reg. Sess., 1990), c. 881, s. 3; 1995, c. 129, s. 21.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added subsection (d).

§ 53-99.1. Confidential records.

(a) As used in this section:

(1) "Compliance review committee" means:

a. An audit, loan review, or compliance committee appointed by the board of directors of a bank or any other person to the extent the person acts at the direction of or reports to a compliance review committee; and

b. Whose functions are to audit, evaluate, report, or determine compliance with any of the following:

1. Loan underwriting standards;
2. Asset quality;
3. Financial reporting to federal or State regulatory agencies;
4. Adherence to the bank's investment, lending, accounting, ethical, and financial standards; or
5. Compliance with federal or State statutory requirements.

(2) "Compliance review documents" means documents prepared for or created by a compliance review committee.

(3) "Bank" means a bank chartered under the laws of North Carolina or of the United States and any subsidiaries thereof.

(4) "Loan review committee" means a person or group of persons who, on behalf of a bank, reviews assets, including loans held by the bank, for the purpose of assessing the credit quality of the loans or the loan application process, compliance with the bank's investment and loan policies and compliance with applicable laws and regulations.

(5) "Person" means an individual, group of individuals, board, committee, partnership, firm, association, corporation, or other entity.

(b) Banks chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State bank regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of a bank or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against a bank, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence. (1995, c. 408, s. 1.)

Editor's Note. — Session Laws 1995, c. 408, s. 4, made this section effective upon ratification. The Act was ratified July 10, 1995.

§ 53-105. Reports of condition.

Every bank shall make to the Commissioner of Banks not less than four reports during each year in the manner and form prescribed by the Commission by regulation. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the Commissioner of Banks specified, and shall be transmitted to the Commissioner of Banks within 10 days after the receipt of a request or requisition therefor from the Commissioner of Banks; provided, however, the Commissioner of Banks may extend the time for a period not to exceed 30 days for any bank to transmit the reports heretofore required whenever in his judgment such extension is necessary; and in a form prescribed by the Commissioner of Banks; a summary of the report for the quarter ending December 31, shall if required by the Commissioner of Banks, be published in a newspaper published in the county where the bank is located, or if there is no newspaper in the county, then in a newspaper having a general circulation in the county in which such bank is established. Proof of such publication shall be furnished the Commissioner of Banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; C.S., s. 222(b); 1931, c. 243, s. 5; 1979, c. 483, s. 12; 1989, c. 187, s. 15; 1995, c. 129, s. 22.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, in the first sentence substituted "the report for the quarter ending December 31" for "such report" following "a summary of", inserted "if required by the Commissioner of Banks" preceding "be published in", twice substituted "county" for "place", and substituted "a newspaper having a general circulation" for "the nearest one published thereto" near the end of the sentence.

§ 53-106. Special reports.

The Commissioner of Banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the Commissioner of Banks and shall be published as provided in G.S. 53-105, if so required by the Commissioner of Banks. The Commissioner of Banks may extend the time for filing special reports for a period not to exceed 30 days. (1921, c. 4, s. 66; C.S., s. 222(d); 1931, c. 243, s. 5; 1981, c. 671, s. 12; 1995, c. 129, s. 23.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, in the second sentence deleted "and shall be verified in the manner provided in G.S. 53-105" following "Commissioner of Banks", substituted "as provided in G.S. 53-105, if so" for "as therein provided, if", and deleted "so to be" from the end of the sentence.

§ 53-114. Other powers of State Banking Commission.

In addition to all other powers conferred upon and vested in the State Banking Commission, the said Commission, with the approval of the Governor, is hereby authorized, empowered and directed, whenever in its judgment the circumstances warrant it:

(1) To authorize, permit, and/or direct and require all banking corporations under its supervision, to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.

(2) To direct, require or permit, upon such terms as it may deem advisable, the issuance of evidence of claims against assets of such banking institutions.

(3) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the State of North Carolina as it shall designate.

(4) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3; 1939, c. 91, s. 2; 1995, c. 129, s. 24.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "evidence" for "clearinghouse certificates or other evidences" in subdivision (2).

ARTICLE 10.

Penalties.

§ 53-125. Examiners disclosing confidential information.

If any bank examiner or other employee of the Commissioner of Banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a Class 1 misdemeanor. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the federal reserve bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary. (1921, c. 4, s. 80; C.S., s. 224(b); 1931, c. 243, s. 5; 1993, c. 539, s. 420; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 129, s. 25.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, deleted "or with the clearing house officials and examiners" from the end of the section.

ARTICLE 11.

Industrial Banks.

§ 53-141. Powers.

Industrial banks shall have the powers conferred by paragraphs 1, 2, 3, 5 and 7 of G.S. 55-17 [subdivisions (1), (2), (3), (5) and (7) of subsection (a) of G.S. 55-17], and subdivision (3) of G.S. 53-43, such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

(1) To discount and negotiate promissory notes, drafts, bills of exchange and other evidences of indebtedness, and to loan money on real or personal security, and to purchase notes, bills of exchange, acceptances or other choses in action, and to take and receive interest or discounts subject to G.S. 53-43(1).

(2) To make loans and charge and receive interest at rates not exceeding the rates of interest provided in G.S. 24-1.1 and 24-1.2.

(3) To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the State, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital

structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find

a. That the establishment of such branch or limited service facility will meet the needs and promote the convenience of the community to be served by the bank, and

b. That the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or limited service facility and of the existing bank or banks in said community.

Provided, that the Commissioner of Banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for capital in an amount equal to that required with respect to the establishment of branches of commercial banks under the provisions of G.S. 53-62. For the purposes of this paragraph, the provisions of G.S. 53-62 as to the meaning of the word "capital" shall be applicable.

A bank may discontinue a branch office upon resolution of its board of directors. Upon the adoption of such a resolution, the bank shall follow the procedures for closing a branch as set forth at G.S. 53-62(e). No branch shall be closed until approved by the Commissioner of Banks.

(4) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contract, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of 1933 (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations.

(5) To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.

(6) Subject to the approval of the State Banking Commission, to solicit, receive and accept money or its equivalent on deposit subject to check; provided, however, no such approval shall be given unless and until such industrial bank meets the capital requirements of a commercial bank as set forth in G.S. 53-2. (1923, c. 225, s. 6; C.S., s. 225(f); 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss.

1, 2; 1943, c. 233; 1945, c. 283; 1949, c. 952, ss. 1, 2; 1959, c. 365; 1967, c. 789, s. 19; 1969, c. 1303, ss. 10-12; 1995, c. 129, s. 26.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "limited service facility" for "teller's window" in subdivisions (3)a. and (3)b. and rewrote the last paragraph in subdivision (3).

§ 53-145. Sections of general law applicable.

Sections 53-1, 53-3, 53-4, 53-5, 53-6, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-22, 53-23, 53-42, 53-42.1, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-68, 53-70, 53-71, 53-73, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-85, 53-87, 53-88, 53-90, 53-91.2, 53-91.3, 53-105, 53-106, 53-107, 53-108, 53-109, 53-110, 53-111, 53-112, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-126, 53-128, 53-129, 53-132, 53-133, 53-134, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this Article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-61, 53-75, 53-76, 53-77, 53-86, 53-113, 53-114, 53-115, 53-116, 53-135, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; C.S., s. 225(m); 1927, c. 141; 1939, c. 244, s. 3; 1945, c. 743, s. 1; 1981, c. 671, s. 14; 1995, c. 129, s. 27.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, in the first sentence, deleted "53-72", "53-74", and "53-91" and inserted "53-91.2, 53-91.3"; and in the second sentence deleted "53-58", "53-59", and "53-66".

ARTICLE 13.

Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers.

After 15 days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in G.S. 53-152 hereof, the provisions of G.S. 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the county in which such bank is located, and if no newspaper is published in such county, in a newspaper having a general circulation in such county, a notice in form approved by the Commissioner of Banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of G.S. 53-151 will not be effective after 15 days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in such bank under G.S. 53-151, a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank under G.S. 53-151, after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6; 1995, c. 129, s. 28.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, deleted "city, town or" preceding "county in which such" and preceding "county, in a newspaper", and substituted "having a general circulation in such county" for "to be selected by the Commissioner of Banks" preceding "a notice in form approved".

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-176. Optional rates, maturities and amounts.

In lieu of making loans in the amount and at the charges stated in G.S. 53-173 and for the terms stated in G.S. 53-180, a licensee may at any time elect to make loans in installments not exceeding ten thousand dollars ($10,000) and which shall not be repayable in less than six months or more than 84 months and which shall not be secured by deeds of trust or mortgages on real estate and which are repayable in substantially equal consecutive monthly payments and to charge and collect interest in connection therewith which shall not exceed the following actuarial rates:

(1) With respect to a loan not exceeding seven thousand five hundred dollars ($7,500), thirty percent (30%) per annum on that part of the unpaid principal balance not exceeding one thousand dollars ($1,000) and eighteen percent (18%) per annum on the remainder of the unpaid principal balance. Interest shall be contracted for and collected at the single simple interest rate applied to the outstanding balance that would earn the same amount of interest as the above rates for payment according to schedule.

(2) With respect to a loan exceeding seven thousand five hundred dollars ($7,500), eighteen percent (18%) per annum on the outstanding principal balance.

In addition to the interest permitted in this section, a licensee may assess at closing a reasonable credit investigation charge as agreed upon by the parties, not to exceed the actual cost of the credit investigation; provided that such charges may not be assessed more than twice in any 12-month period. The Commissioner of Banks may review charges assessed pursuant to this section and may adopt appropriate rules in accordance with G.S. 53-185.

The provisions of G.S. 53-173(b), (c) and (d) and G.S. 53-180(b), (c), (d), (e), (f), (g), (h) and (i) shall apply to loans made pursuant to this section.

Any licensee under this Article shall have the right to elect to make loans in accordance with this section by the filing of a written statement to that effect with the Commissioner and on date of such notification begin making loans regulated by this section for the following 12 months. Annually after such election a licensee may elect to make loans in accordance with this section unless the licensee notifies in writing the Commissioner of its intention to terminate such election.

The due date of the first monthly payment shall not be more than 45 days following the disbursement of funds under any such installment loan. A borrower under this section may prepay all or any part of a loan made under this section without penalty.

No individual, partnership, or corporate licensee and no corporation which is the parent, subsidiary or affiliate of a corporate licensee that is making loans under this Article except as authorized in this section, shall be permitted to make loans under the provisions of this section. Any corporate licensee or individual or partnership licensee that elects to make loans in accordance with the provisions of this section shall be bound by that election with respect to all of its offices and locations in this State and all offices and locations in this State of its parent, subsidiary or affiliated corporate licensee, or with respect to all of his or their offices and locations in this State. (1961, c. 1053, s. 1; 1969, c. 1303, s. 12.1; 1981, c. 561, s. 7; 1983, c. 68, s. 1; c. 126, ss. 14, 15; 1989, c. 17, s. 6; 1995, c. 155, s. 1.)

Effect of Amendments. — The 1995 amendment, effective June 1, 1995, added the paragraph immediately following subdivision (2) and made stylistic changes in the last paragraph in the section.

§ 53-188. Review of regulations, order or act of Commission or Commissioner.

The Commission shall have full authority to review any rule, regulation, order or act of the Commissioner done pursuant to or with respect to the provisions of this Article and any person aggrieved by any such rule, regulation, order or act may appeal to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order or act complained of is adopted, issued or done. Notwithstanding any other provision of law to the contrary, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 53- 92. (1957, c. 1429, s. 6; 1961, c. 1053, s. 1; 1973, c. 1331, s. 3; 1987, c. 827, s. 13; 1995, c. 129, s. 29.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added the last sentence in the section.

ARTICLE 16.

Money Transmitters Act.

§ 53-206. Notice of denial or revocation of license; hearing; appeal.

(a) No license shall be denied or revoked except on 10 days' notice to the applicant or licensee. Upon receipt of such notice the applicant or licensee may, within five days of such receipt, make written demand for a hearing. The hearing before the Commissioner shall be an informal hearing and shall be held with reasonable promptness.

(b) The Banking Commission shall have full authority to review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article; and any person aggrieved by any such rule, regulation, order, or act may appeal to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1963, c. 1251, s. 15; 1987, c. 827, s. 14; 1995, c. 129, s. 30.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added the subsection (a) designation; deleted the last sentence of subsection (a), which read "The decision of the Commissioner may be appealed to the Banking Commission"; and added subsection (b).

ARTICLE 17A.

Interstate Branch Banking.

§§ 53-219 through 53-224.8: Repealed by Session Laws 1995, c. 322, s. 1, effective June 22, 1995.

ARTICLE 17B.

Interstate Branch Banking.

Part 1. Definitions.

§ 53-224.9. Definitions.

The following definitions apply in this Article:

(1) "Acquisition of a branch" means the acquisition of a branch located in a host state without engaging in an "interstate merger transaction" as defined in Part 2 of this Article.

(2) "Bank" has the meaning set forth in 12 U.S.C. § 1813(h); provided that the term "bank" shall not include any "foreign bank" as defined in 12 U.S.C. § 3101(7), except that such term shall include any foreign bank organized under the laws of a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, the deposits of which are insured by the Federal Deposit Insurance Corporation.

(3) "Bank holding company" has the meaning set forth in 12 U.S.C. § 1841(a)(1).

(4) "Bank supervisory agency" means:
  a. The Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and any successor to these agencies; and
  b. Any agency of another state with primary responsibility for chartering and supervising banks.

(5) "Branch" means a full service office of a bank through which it receives deposits, checks are paid, or loans are made, other than its principal office. Any of the functions or services authorized to be engaged in by a bank may be carried out in an authorized branch office.

(6) "Commissioner" means the Commissioner of Banks for the State of North Carolina.

(7) "Control" has the meaning set forth in 12 U.S.C. § 1841(a)(2).

(8) "De novo branch" means a branch of a bank located in a host state which (i) is originally established by the bank as a branch and (ii) does not become a branch of the bank as a result of (A) the acquisition of another bank or a branch of another bank, or (B) the merger, consolidation, or conversion involving any such bank or branch.

(9) "Home state" means:
   a. With respect to a national bank, the state in which the main office of the bank is located;
   b. With respect to a state bank, the state by which the bank is chartered;
   c. With respect to a foreign bank, the state determined to be the home state of such foreign bank under 12 U.S.C. § 103(c).

(10) "Host state" means a state, other than the home state of a bank, in which the bank maintains, or seeks to establish and maintain a branch.

(11) "Interstate merger transaction" means:
   a. The merger or consolidation of banks with different home states, and the conversion of branches of any bank involved in the merger or consolidation into branches of the resulting bank; or
   b. The purchase of all or substantially all of the assets, including all or substantially all of the branches, of a bank whose home state is different from the home state of the acquiring bank.

(12) "North Carolina bank" means a bank whose home state is North Carolina.

(13) "North Carolina State bank" means a bank chartered under the laws of North Carolina.

(14) "Out-of-state bank" means a bank whose home state is a state other than North Carolina.

(15) "Out-of-state state bank" means a bank chartered under the laws of any state other than North Carolina.

(16) "Resulting bank" means a bank that has resulted from an interstate merger transaction under this Article.

(17) "State" means any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands. (1995, c. 322, s. 2.)

Editor's Note. — Session Laws 1995, c. 322, s. 3, which enacted this Article, in section 2 provides "Section 2 of this act is effective July 1, 1995. The remainder of this act is effective upon ratification." Session Laws 1995, c. 322 contained two sections numbered as 2.

Part 2. Interstate de novo Branching and Acquisition of Branches.

§ 53-224.10. Purpose.

It is the express intent of this Part to permit interstate branching under sections 102 and 103 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103-328, in accordance with the provisions in this Part. (1995, c. 322, s. 2.)

§ 53-224.11. Interstate branching by North Carolina State banks.

(a) With the prior approval of the Commissioner, any North Carolina State bank may establish and maintain a de novo branch or acquire a branch in a state other than North Carolina.

(b) A North Carolina State bank desiring to establish and maintain a branch in another state under this section shall file an application on a form prescribed by the Commissioner and pay the branch application fee prescribed by regulation pursuant to G.S. 53-122. If the Commissioner finds that the applicant has the financial resources sufficient to undertake the proposed expansion without adversely affecting its safety or soundness and that the establishment of the proposed branch is in the public interest, the Commissioner may approve the application. In acting on the application, the Commissioner shall consider the views of the appropriate bank supervisory agencies. The applicant bank may establish the branch when it has received the written approval of the Commissioner. (1995, c. 322, s. 2.)

§ 53-224.12. Interstate branching by de novo entry.

An out-of-state bank that does not have a branch in North Carolina and that meets the requirements of this Article may establish and maintain a de novo branch in this State. (1995, c. 322, s. 2.)

§ 53-224.13. Interstate branching through the acquisition of a branch.

An out-of-state bank that does not have a branch in North Carolina and that meets the requirements of this Article may establish and maintain a branch in this State through the acquisition of a branch. (1995, c. 322, s. 2.)

§ 53-224.14. Requirement of notice and other conditions.

(a) An out-of-state bank desiring to establish and maintain a de novo branch or to acquire a branch in this State shall provide written notice of the proposed transaction to the Commissioner not later than the date on which the bank applies to the responsible federal bank supervisory agency for approval to establish or acquire the branch. The filing of such notice shall be accompanied by the filing fee prescribed by the Commissioner by regulation.

(b) The out-of-state bank shall comply with the applicable requirements of Article 15 of Chapter 55 of the North Carolina General Statutes.

(c) Prior to June 1, 1997, an out-of-state bank may establish and maintain a de novo branch or may establish and maintain a branch through acquisition of a branch if:

(1) In the case of a de novo branch, the laws of the home state of the out-of-state bank permit North Carolina banks to establish and maintain de novo branches in that state under substantially the same terms and conditions as herein set forth; and

(2) In the case of a branch established through the acquisition of a branch, the laws of the home state of the out-of-state bank permit North Carolina banks to establish and maintain branches in that state through the acquisition of branches under substantially the same terms and conditions as herein set forth. (1995, c. 322, s. 2.)

§ 53-224.15. Conditions for approval.

In the case of notice under G.S. 53-224.14 by an out-of-state state bank, the notice shall be subject to approval by the Commissioner, which approval shall be effective only if:

(1) The bank confirms in writing to the Commissioner that as long as it maintains a branch in North Carolina, it will comply with all applicable laws of this State.

(2) The Commissioner, acting within 60 days after receiving notice of an application under G.S. 53-224.14, certifies to the responsible federal bank supervisory agency that the requirements of this Part have been met by the bank. (1995, c. 322, s. 2.)

§ 53-224.16. Powers.

(a) An out-of-state state bank which establishes and maintains one or more branches in North Carolina under this Article may conduct any activities at such branch or branches that are authorized under the laws of this State for North Carolina State banks, except to the extent such activities may be prohibited by other laws, regulations, or orders applicable to the out-of-state state bank.

(b) A North Carolina State bank may conduct any activities at a branch outside of North Carolina that are permissible for a bank chartered by the host state where the branch is located, except to the extent such activities are expressly prohibited by the laws of this State or by any regulation or order of the Commissioner applicable to the North Carolina State bank. (1995, c. 322, s. 2.)

Part 3. Interstate Bank Mergers.

§ 53-224.17. Purpose.

It is the express intent of this Part to permit interstate branching by merger under section 102 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103-328, in accordance with the provisions of this Part. (1995, c. 322, s. 2.)

§ 53-224.18. Authority of State banks to establish interstate branches by merger.

With the prior approval of the Commissioner, a North Carolina State bank may establish, maintain, and operate one or more branches in a state other than North Carolina pursuant to an interstate merger transaction in which the North Carolina State bank is the resulting bank. Not later than the date on which the required application for the interstate merger transaction is filed with the responsible federal bank supervisory agency, the applicant North Carolina State bank shall file an application on a form prescribed by the Commissioner and pay the fee prescribed by regulation pursuant to G.S. 53-122. The applicant shall also comply with the applicable provisions of G.S. 53-12. If the Commissioner finds that (i) the proposed transaction will not be detrimental to the safety and soundness of the applicant or the resulting bank, (ii) any new officers and directors of the resulting bank are qualified by character, experience, and financial responsibility to direct and manage the resulting bank, and (iii) the proposed merger is consistent with the convenience and needs of the communities to be served by the resulting bank in this State and is otherwise in the public interest, it shall approve the interstate merger transaction and the operation of branches outside of North Carolina by the North Carolina State bank. Such an interstate merger transaction may be consummated only after the applicant has received the Commissioner's written approval. (1995, c. 322, s. 2.)

§ 53-224.19. Interstate merger transactions and branching permitted.

One or more North Carolina banks may enter into an interstate merger transaction with one or more out-of-state banks under this Article, and an out-of-state bank resulting from such an interstate merger transaction may maintain and operate the branches in North Carolina of a merged North Carolina bank provided that the conditions and filing requirements of this Article are met. (1995, c. 322, s. 2.)

§ 53-224.20. Notice and filing requirements.

Any out-of-state bank that will be the resulting bank pursuant to an interstate merger transaction involving a North Carolina bank shall notify the Commissioner of the proposed merger not later than the date on which it files an application for an interstate merger transaction with the responsible federal bank supervisory agency, and shall submit a copy of that application to the Commissioner and pay the filing fee required by the Commissioner. All banks which are parties to such interstate merger transaction involving a North Carolina State bank shall comply with G.S. 53-12 and with other applicable state and federal laws. Any out-of-state bank which shall be the resulting bank in such an interstate merger transaction shall comply with Article 15 of Chapter 55 of the North Carolina General Statutes. (1995, c. 322, s. 2.)

§ 53-224.21. Conditions for interstate merger prior to June 1, 1997.

An interstate merger transaction prior to June 1, 1997, involving a North Carolina bank shall not be consummated, and any out-of-state bank resulting from such a merger shall not operate any branch in North Carolina, unless the laws of the home state of each out-of-state bank involved in the interstate merger transaction permits North Carolina banks under substantially the same terms and conditions as are set forth in Part 3 to acquire banks and establish and maintain branches in that state by means of interstate merger transactions. (1995, c. 322, s. 2.)

§ 53-224.22. Powers.

(a) An out-of-state state bank which establishes and maintains one or more branches in North Carolina under this Article may conduct any activities at such branch or branches that are authorized under the laws of this State for North Carolina State banks, except to the extent such activities may be prohibited by other laws, regulations, or orders applicable to the out-of-state state bank.

(b) A North Carolina State bank may conduct any activities at a branch outside of North Carolina that are permissible for a bank chartered by the host state where the branch is located, except to the extent such activities are expressly prohibited by the laws of this State or by any regulation or order of the Commissioner applicable to the North Carolina State bank. (1995, c. 322, s. 2.)

Part 4. Supervisory Authority.

§ 53-224.23. Applicability of supervisory authority.

The supervisory powers and other provisions set forth in G.S. 53-224.24 through G.S. 53-224.31 shall apply to Parts 2 and 3 of this Article. (1995, c. 322, s. 2.)

§ 53-224.24. Examinations; periodic reports; cooperative agreements; assessment of fees.

(a) The Commissioner may make such examinations of any branch of an out-of-state state bank established under this Article and located in this State as the Commissioner may deem necessary to determine whether the branch is operating in compliance with the laws of this State and to ensure that the branch is being operated in a safe and sound manner. The provisions of G.S. 53-117 apply to such examinations.

(b) The Commissioner may require periodic reports regarding any branch in North Carolina of an out-of-state bank to the extent that comparable reports are required from North Carolina State banks. Such reports shall be filed under oath with such frequency and in such scope and detail as may be appropriate for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Commissioner may enter into cooperative, coordinating, and information-sharing agreements with any other bank supervisory agencies or any organization affiliated with or representing one or more bank supervisory agencies with respect to the periodic examination or other supervision of any branch in North Carolina of an out-of-state state bank, or any branch of a North Carolina State bank in a host state, and the Commissioner may accept such parties' reports of examination and reports of investigation in lieu of conducting an additional examination or investigation. The Commissioner may enter into joint examinations or joint enforcement actions with other bank supervisory agencies having concurrent jurisdiction over any branch in North Carolina of an out-of-state state bank or any branch of a North Carolina State bank in any host state; provided, however, that the Commissioner may at any time take such actions independently if the Commissioner deems such actions to be necessary or appropriate to carry out the Commissioner's responsibilities under this Article and to ensure compliance with the laws of this State.

(d) Each out-of-state state bank that maintains one or more branches in this State may be assessed and, if assessed, shall pay supervisory and examination fees in accordance with the laws of this State and regulations of the Commissioner. Such fees may be shared with other bank supervisory agencies or any organization affiliated with or representing one or more bank supervisory agencies in accordance with agreements between such parties and the Commissioner. (1995, c. 322, s. 2.)

§ 53-224.25. Enforcement.

If the Commissioner determines that a branch maintained by an out-of-state state bank in this State is being operated in violation of any provision of the laws of this State, or that such branch is being operated in an unsafe and unsound manner, the Commissioner shall have the authority to take all such enforcement actions as the Commissioner would be empowered to take if the branch were a North Carolina State bank. (1995, c. 322, s. 2.)

§ 53-224.26. Rules.

The Commissioner, subject to review and approval of the North Carolina State Banking Commission, may adopt rules needed to implement this Article. Chapter 150B of the General Statutes governs the adoption of rules by the Commissioner. (1995, c. 322, s. 2.)

§ 53-224.27. Additional branches.

An out-of-state bank that has a branch in North Carolina may establish and acquire additional branches in this State to the same extent as a North Carolina State bank or to the same extent otherwise permitted by federal law. (1995, c. 322, s. 2.)

§ 53-224.28. Notice of subsequent merger or other change in control.

An out-of-state bank that maintains a branch in this State established pursuant to this Article shall give 30 days' prior written notice to the Commissioner of any merger, consolidation, or other transaction that would cause a change of control with respect to such out-of-state bank or any bank holding company that controls such bank, with the result that an application would be required to be filed pursuant to the federal Change in Bank Control Act of 1978, as amended, 12 U.S.C. § 1817(j) or the federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 et seq., or any successor statutes thereto. (1995, c. 322, s. 2.)

§ 53-224.29. Branch closings.

An out-of-state state bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any North Carolina State bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1995, c. 322, s. 2.)

§ 53-224.30. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Commissioner, appeal such decision to the North Carolina State Banking Commission. The State Banking Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Commissioner's decision. Failure of the State Banking Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the State Banking Commission approving the decision of the Commissioner. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1995, c. 322, s. 2.)

§ 53-224.31. Severability.

If any provision of this Article or the application of such provision is found invalid as to any bank, branch, bank holding company, person, or circumstances, or shall otherwise be deemed superseded by federal law, the remaining provisions of this Article shall not be affected and shall remain valid and in effect as to any bank, branch, bank holding company, person, or circumstance. (1995, c. 322, s. 2.)

ARTICLE 18.

Bank Holding Company Act of 1984.

§ 53-229: Repealed by Session Laws 1995, c. 129, s. 3, effective May 31, 1995.

§ 53-230. Rules.

The Banking Commission may adopt such reasonable rules as may be necessary to effectuate the purposes of this Article. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1995, c. 129, s. 32.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "The Banking Commission may adopt" for "Notwithstanding the provision of G.S. 53-95, the Commissioner may promulgate" at the beginning of the section.

§ 53-231. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Commissioner, appeal such decision to the Banking Commission. The Banking Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Commissioner's decision. Failure of the Banking Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Banking Commission approving the decision of the Commissioner. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1995, c. 129, s. 33.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote this section.

ARTICLE 18A.

North Carolina International Banking Act.

§ 53-232.17. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Commissioner, appeal such decision to the Banking Commission. The Banking Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Commissioner's decision. Failure of the Banking Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Banking Commission approving the decision of the Commissioner. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1991, c. 679, s. 1; 1995, c. 129, s. 34.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote this section.

ARTICLE 19.

Registration of Mortgage Bankers and Brokers.

§ 53-234. Definitions.

The following definitions apply in this Article:

(1) "Mortgage loan" means a loan to a natural person or persons made primarily for personal, family or household use, primarily secured by either a mortgage or a deed of trust on residential real property.

(2) "Residential real property" means real property located in this State upon which there is located or there is to be located one or more single family dwellings or dwelling units.

(3) "Mortgage banker" means a person or entity who or which for compensation or gain, either directly or indirectly, advances funds, offers to advance funds, or makes a commitment to advance funds to an applicant for a mortgage loan.

(4) "Mortgage broker" means a person or entity in the business of soliciting, processing, placing or negotiating mortgage loans for others or offering to process, place or negotiate mortgage loans for others.

(5) "Soliciting, processing, placing or negotiating a mortgage loan" means for compensation or gain, either directly or indirectly, accepting or offering to accept an application for a mortgage loan, assisting or offering to assist in the processing of an application for a mortgage loan, soliciting or offering to solicit a mortgage loan on behalf of a third party or negotiating or offering to negotiate the terms or conditions of a mortgage loan with a lender on behalf of a third party.

(6) "Exempt person or organization" means:

(a) Any lender authorized to engage in business as a bank, a farm credit system, life insurance company, savings institution, credit union, or HUD-approved mortgagee under the laws of the United States or the State of North Carolina and subsidiaries and affiliates of such lenders, which subsidiaries and affiliates are subject to the general supervision or regulation of the lender or subject to audit or examination by a regulatory body or agency of the United States or the State of North Carolina; the entities listed in this sub-subdivision, and their officers and employees, are not subject to any of the provisions of this Article; or

(b) Any licensed real estate agent or broker, who is performing those activities subject to the regulation of the North Carolina Real Estate Commission. Notwithstanding the above, an exempt person does not include a real estate agent or broker who receives direct compensation or income in connection with the placement of a mortgage loan; or

(c) Any person who, as seller, receives in one calendar year no more than ten mortgages, deeds of trust, or other security instruments on real estate as security for a purchase money obligation; or

(d) The North Carolina Housing Finance Agency as established by Chapter 122A of the General Statutes and the North Carolina Agricultural Finance Authority as established by Chapter 122D of the General Statutes; or

(e) Any agency of the federal government or any state or municipal government granting first mortgage loans under specific authority of the laws of any state or the United States.

(7) "Registrant" means any person or entity who or which is registered pursuant to G.S. 53-236:

(a) Which engages in the business of making mortgage loans in this State; or

(b) Which engages in the business of soliciting, processing, placing or negotiating mortgage loans for others, or offering to process, place or negotiate mortgage loans for others.

(8) "Commissioner" means the Commissioner of Banks of this State. (1987 (Reg. Sess., 1988), c. 1017, s. 1; 1989, c. 500, s. 109(f); 1989 (Reg. Sess., 1990), c. 1074, s. 32(a), (d); 1995, c. 129, s. 35.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, in subdivision (6)(a) deleted "or" preceding "credit union" and inserted "or HUD-approved mortgagee" following "credit union".

§ 53-235. Registration requirements of mortgage bankers and mortgage brokers.

(a) No mortgage banker, as defined in G.S. 53-234(3), shall engage in the business of making mortgage loans without first being registered with the Commissioner in accordance with the registration procedure provided in this Article and such regulations as may be promulgated by the Commissioner.

(b) No mortgage broker, as defined in G.S. 53-234(4), shall engage in the business of processing, placing or negotiating a mortgage loan or offering to process, place or negotiate a mortgage loan in this State without first being registered with the Commissioner in accordance with the registration procedure provided in this Article and such regulations as may be promulgated by the Commissioner; provided, however, any person or entity registered as a mortgage banker pursuant to subsection (a) of this section shall not be required to separately register as a mortgage broker to engage in such activity.

(c) Notwithstanding subsections (a) and (b) of this section, the registration provisions of this Article shall not apply to any exempt persons or entities as defined by G.S. 53-234(6).

(d) Notwithstanding any other provision of law, an affiliate operating in the same office or subsidiary operating in the same office of a licensee under the North Carolina Consumer Finance Act shall register with the Commissioner in accordance with the registration procedures provided in this Article: Provided, however, such affiliate or subsidiary shall be exempt from the payment of any required fees under this Article. (1987 (Reg. Sess., 1988), c. 1017, s. 1; 1989, c. 17, s. 12; 1995, c. 129, s. 36.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added the language beginning "provided however, any person" to the end of subsection (b).

§ 53-240. Appeal of Commissioner's decision.

The Banking Commission shall have full authority to review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article; and any person aggrieved by any such rule, regulation, order, or act may appeal to the Banking Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1987 (Reg. Sess., 1988), c. 1017, s. 1; 1995, c. 129, s. 37.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote this section.

§ 53-241. Rules and regulations.

The Banking Commission may adopt such reasonable rules and regulations as may be necessary to effectuate the purpose of this Article, to provide for the protection of the borrowing public, and to instruct mortgage lenders in interpreting this Article. (1987 (Reg. Sess., 1988), c. 1017, s. 1; 1995, c. 129, s. 38.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "The Banking Commission may adopt" for "Notwithstanding the provision of G.S. 53-95, the Commissioner may promulgate" at the beginning of the section.

ARTICLE 20.

Refund Anticipation Loan Act.

§ 53-248. Registration procedure; informal hearing.

(a) Initial Registration. An application to become registered as a facilitator shall be in writing, under oath, and in a form prescribed by the Commissioner. The application shall contain all information prescribed by the Commissioner. Each application for registration shall be accompanied by a fee, payable to the Commissioner, of two hundred fifty dollars ($250.00) for each office where the registrant intends to facilitate refund anticipation loans.

Upon the filing of an application for registration, if the Commissioner finds that the responsibility and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business of facilitating refund anticipation loans will be operated within the purposes of this Article, the Commissioner shall register the applicant as a facilitator of refund anticipation loans and shall issue and transmit to the applicant a certificate attesting to the registration. If the Commissioner does not so find, he shall not register the applicant and shall notify the applicant of the reasons for the denial.

Upon receipt of a certificate of registration, the applicant is registered under this Article and may engage in the business of facilitating refund anticipation loans at the offices identified on the application for registration.

(b) Renewal. Each registration as a facilitator of refund anticipation loans shall expire on December 31 following the date it was issued, unless it is renewed for the succeeding year. Before the registration expires, the registrant may renew the registration by filing with the Commissioner an application for renewal in the form and containing all information prescribed by the Commissioner. Each application for renewal of registration shall be accompanied by a fee of one hundred dollars ($100.00) for each office where the registrant intends to facilitate refund anticipation loans during the succeeding year.

Upon the filing of an application for renewal of registration under this Article, the Commissioner shall renew the registration unless the Commissioner determines that the fitness of the registrant or the operations of the registrant would not support registration of the registrant under subsection (a). If the Commissioner makes such a determination, he shall so notify the registrant, stating the reasons for the determination.

(c) Display of Certificate. Each registrant shall prominently display a certificate issued under this Article in each place of business in the State where the registrant facilitates the making of refund anticipation loans.

(d) Within five days of receipt of the Commissioner's notice, as required by subsections (a) and (b) of this section, the applicant may make written demand of the Commissioner for a hearing. The hearing before the Commissioner shall be an informal hearing and shall be held with reasonable promptness. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1995, c. 129, s. 39.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, added "informal hearing" to the catchline and added subsection (d).

§ 53-252. Appeal of Commissioner's decision.

The Commission shall have full authority to review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article; and any person aggrieved by any such rule, regulation, order, or act may appeal to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1995, c. 129, s. 40.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, rewrote this section.

§ 53-253. Rules; enforcement.

The Banking Commission may adopt reasonable rules as necessary to effectuate the purpose of this Article, to provide for the protection of the borrowing public, and to assist registrants in interpreting this Article. In order to enforce this Article, the Commissioner may make investigations, subpoena witnesses, require audits and reports, and conduct hearings regarding possible violations of its provisions. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1995, c. 129, s. 41.)

Effect of Amendments. — The 1995 amendment, effective May 31, 1995, substituted "The Banking Commission may adopt" for "Notwithstanding the provisions of G.S. 53-95, the Commissioner may promulgate" at the beginning of the section.

ARTICLE 21.

Reverse Mortgages.

§ 53-255. Title.

Editor's Note. — Session Laws 1991, c. 546, s. 3 made this Article effective October 1, 1991. Session Laws 1995, c. 115, s. 1 removed the October 1, 1995, expiration date originally provided in c. 546, s. 3 for this Article.

§ 53-272. Appeals.

The Banking Commission shall have full authority to review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article; and any person aggrieved by any such rule, regulation, order, or act may appeal to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92. (1991, c. 546, s. 1; 1995, c. 115, s. 1; c. 129, s. 42.)

Effect of Amendments. — Session Laws 1995, c. 129, s. 42, effective May 31, 1995, rewrote this section.

Chapter 53A.

Business Development Corporations and North Carolina Capital Resource Corporations.

Article 1.

Business Development Corporations.

Sec.
53A-1 through 53A-18. [Repealed.]
53A-19. [Reserved.]

Article 2.

North Carolina Capital Resource Corporations.

53A-20 through 53A-34. [Expired.]

Article 3.

North Carolina Enterprise Corporations.

Sec.
53A-46. Tax credit.

ARTICLE 1.

Business Development Corporations.

§§ 53A-1 through 53A-18: Repealed by Session Laws 1995, c. 46, s. 1, effective July 1, 1995.

§ 53A-19: Reserved for future codification purposes.

ARTICLE 2.

North Carolina Capital Resource Corporations.

§§ 53A-20 through 53A-34: Expired.

Editor's Note. — Section 53A-34 of this Article provided, inter alia, that if no corporation was organized pursuant to this Article at the expiration of three years after July 1, 1987, the Article would expire on that date. According to information from the Secretary of State's office and the Commissioner of Banks, no corporation was formed under this Article as of July 1, 1990; therefore, the Revisor of Statutes has directed that this Article be set out as expired, effective July 1, 1990.

For the text of former §§ 53A-20 through 53A-34, see the main volume.

ARTICLE 3.

North Carolina Enterprise Corporations.

§ 53A-46. Tax credit.

A person or corporation that invests in the equity securities of a North Carolina Enterprise Corporation or in the equity securities of a limited partnership in which a North Carolina Enterprise Corporation is the only general partner is entitled to a tax credit as provided in G.S. 105-163.010 through G.S. 105-163.014. (1987 (Reg. Sess., 1988), c. 882, s. 1; 1989 (Reg. Sess., 1990), c. 848, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 848, s. 1, which amended this section, was effective for taxable years beginning on or after January 1, 1990.

Chapter 53B.

Editor's Note. — The legislation and annotations affecting Chapter 53B have been included in a recently published replacement chapter.

Chapter 54.

Cooperative Organizations.

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

Article 8.

Organization and Powers.

Sec.
54-67. Redemption of bonds.

SUBCHAPTER III. CREDIT UNIONS.

Article 14A.

Formation of Credit Union.

54-109.5. Use of name exclusive.
54-109.7. Conducting business outside this State.
54-109.8, 54-109.9. [Reserved.]

Article 14B.

Supervision and Regulation.

54-109.10. Creation and supervision of Division.
54-109.11. Duties of Administrator.
54-109.15. Reports.

Article 14C.

Powers of Credit Union.

54-109.21. General powers.

Article 14F.

Savings Accounts.

54-109.57. Trusts accounts.
54-109.58. Joint accounts.
54-109.63. Personal agency accounts.

Article 14-I.

Investments.

54-109.82. Investment of funds.

Article 14M.

Confidential Information.

Sec.
54-109.105. What information deemed confidential; disclosure; certain information deemed public; exchange of information.

Article 14N.

Foreign Credit Unions.

54-109.106. Foreign Credit Unions.

SUBCHAPTER V. MARKETING ASSOCIATIONS.

Article 19.

Purpose and Organization.

54-139. Foreign cooperative corporations; limitation on use of word "cooperative."
54-142. Application of North Carolina Business Corporation Act to cooperative associations with capital stock.

Article 21.

Powers, Duties, and Liabilities.

54-157. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

ARTICLE 8.

Organization and Powers.

§ 54-67. Redemption of bonds.

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of effecting redemption in accordance with the conditions of the bonds and as provided by law and the bylaws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19; 1993, c. 553, s. 15.)

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 14A.

Formation of Credit Union.

§ 54-109.5. Use of name exclusive.

With the exception of a credit union organized under the provisions of Articles 14A to 14L of this Chapter or of any other credit union act, or an association of credit unions or a recognized chapter thereof, any person, corporation, copartnership or association using a name or title containing the words "credit union" or any derivation thereof or representing themselves in their advertising or otherwise as conducting business as a credit union shall be guilty of a Class 1 misdemeanor, and may be permanently enjoined from using such words in its name. (1915, c. 115, s. 4; C.S., s. 5214; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236; 1975, c. 538, s. 1; 1993, c. 539, s. 428; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor punishable by fine of not more than five hundred dollars ($500.00) or imprisoned not more than one year, or both".

§ 54-109.7. Conducting business outside this State.

A credit union incorporated under this Subchapter may conduct business outside of this State in any state where it is permitted to conduct business as a credit union. (1991, c. 651, s. 1.)

Editor's Note. — Session Laws 1991, c. 651, s. 5 made this section effective October 1, 1991.

§§ 54-109.8, 54-109.9: Reserved for future codification purposes.

ARTICLE 14B.

Supervision and Regulation.

§ 54-109.10. Creation and supervision of Division.

There shall be established in the North Carolina Department of Commerce a Credit Union Division which shall be under the supervision of the Administrator of Credit Unions appointed by the Secretary of Commerce. The Credit Union Division and the Administrator of Credit Unions shall be under the general direction and supervision of the Secretary of Commerce, and there shall be such assistants to the Administrator of Credit Unions as may be necessary and the salaries of the Administrator and assistants shall be fixed by the State Personnel Council. (1915, c. 115, s. 1; C.S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87; 1965, c. 956, s. 1; 1971, c. 864, s. 17; 1975, c. 538, s. 1; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 3.)

§ 54-109.11. Duties of Administrator.

The duties of the Administrator of Credit Unions shall be as follows:

(1) To organize and conduct in the State Department of Commerce, a bureau of information in regard to cooperative associations and rural and industrial credits.

(2) Upon request, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.

(3) To maintain an educational campaign in the State looking to the promotion and organization of credit unions. Upon the written request of 12 bona fide residents of any particular locality in this State expressing a desire to form a local credit union at or in such locality, the Administrator of Credit Unions, or one of his assistants, shall proceed as promptly as may be convenient to such locality and make an investigation in order that the Administrator may determine whether or not a local credit union should be established according to the standards set forth and provided in this Article. The Administrator shall notify the

applicants of his decision within 30 days after receipt of the written request. Before refusing the establishment of a credit union, the Administrator shall afford the applicants an opportunity to be heard therewith in person or by counsel and at least 60 days prior to the date set for a hearing on any such matter shall notify in writing the applicants of the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150B of the General Statutes of North Carolina, as amended.

(4) To examine at least once a year, and oftener if such examination be deemed necessary by the Administrator or his assistant, the credit unions formed under this Article. A report of such examination shall be filed with the State Department of Commerce, and a copy mailed to the credit union at its proper address.

(5) The Administrator of Credit Unions is authorized, empowered, and directed to fix the amount of a blanket surety bond which shall be required of each credit union official, committee member and employee, irrespective of whether such official, committee member and employee receives, pays or has custody of money or other personal property owned by a credit union or in the custody or control of the credit union as collateral or otherwise. The surety on the bond shall be a surety company authorized to do business in North Carolina. Any such bond or bonds shall be in a form approved by the Administrator of Credit Unions with a view to providing surety coverage to the credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction or misapplication on the part of the person, directly or through connivance with others, and such other surety coverages as the Administrator of Credit Unions may determine to be reasonably appropriate or as elsewhere required by the Chapter. Any such bond or bonds shall be in an amount in relation to the money or other personal property involved or in relation to the assets of the credit union as the Administrator may from time to time prescribe by regulation for the purpose of requiring reasonable coverage. The Administrator may also approve the use of a form of excess coverage bond whereby a credit union may obtain an amount of coverage in excess of the basic surety coverage. No agreement, compromise or settlement of any claim or claims filed by a credit union with any surety or any surety company for less than the full amount of said claim or claims shall be entered into or made by the board of directors of any credit union unless and until the said claim or claims shall have been submitted to the Administrator of Credit Unions and his advice thereon given or transmitted to the board of directors of said credit union. The following schedule shall be deemed as the minimum fidelity and faithful performance bond requirements only:

Assets			*Minimum Coverage*
$ 0,000	to	$ 5,000	$ 1,000
5,001	to	10,000	2,000
10,001	to	20,000	4,000
20,001	to	30,000	6,000
30,001	to	40,000	8,000
40,001	to	50,000	10,000
50,001	to	75,000	15,000
75,001	to	100,000	20,000
100,001	to	200,000	30,000
200,001	to	300,000	40,000
300,001	to	400,000	50,000
400,001	to	500,000	70,000
500,001	to	750,000	85,000
750,001	to	1,000,000	100,000
1,000,001	to	50,000,000	$100,000 plus $50,000 for each million or fraction thereof of assets over $1,000,000
$50,000,001	to	$150,000,000	$2,500,000 plus $25,000 for each million or fraction thereof of assets over $50,000,000
Over $150,000,000			$5,000,000

It shall be the duty of the board of directors of each credit union to provide proper protection to meet any circumstances by obtaining adequate bond (an insurance) coverage in excess of the above minimum schedule. The treasurer and all other persons handling credit union funds or records before entering upon his or their duties shall give a proper bond with good and sufficient surety, in an amount and character to be determined by the board in compliance with regulations conditioned upon the faithful performance of his or their trust.

The Administrator may require additional coverage for any credit union when, in his opinion, the surety bonds in force are insufficient to provide adequate surety coverage, and it shall be the duty of the board of directors of any credit union to obtain such additional coverage within 60 days after the date of written notice by the Administrator to such board of directors. For good cause shown, the Administrator may extend the time to obtain additional coverage. (1915, c. 115, s. 1; C.S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; 1957, c. 989, s. 1; 1965, c. 956, ss. 1-3; 1971, c. 864, s. 17; 1973, c. 199, ss. 1-3; c. 1331, s. 3; 1975, c. 538, s. 1; 1977, c. 559, s. 1; 1987, c. 827, s. 1; 1989, c. 751, s. 7(2); 1991 (Reg. Sess., 1992), c. 959, ss. 4, 4.1.)

OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 8 (1989).*

The language of subdivision (5) of this section and of § 54-109.44(2) relating to blanket surety bonds is mandatory and extends to all state-chartered credit union officers, employees, agents, and others in a position of trust. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

And Conflicting Administrative

Rule Was Void. — To the extent that an administrative rule purported to permit an individual's bond to be substituted for the blanket bond or to permit an individual's bond to cover persons other than those specified in subdivision (5) of this section, it was in conflict with controlling law and was void. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

Discretion of Administrator and Board. — The provision of subdivision (5) of this section requiring a surety bond of the "treasurer and all other persons handling credit union funds or records" means that the board of directors may require, consistent with administrative rules promulgated by the administrator, an additional surety bond for those having actual possession of or control over credit union funds or financial records. Since the administrator has broad discretion and authority under § 54-109.12 to prescribe rules "relating to financial records, business practices and the conduct and management of credit unions," the administrator can promulgate reasonable guidelines for boards of directors to follow in determining the "amount and character" of the bond to be required. However, it is not within the discretion of a board of directors or the administrator to determine who shall be covered by the bond, other than to identify "persons handling credit union funds or records." See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

The additional bond provided for in subdivision (5) of this section, must cover "the treasurer and all other persons handling credit union funds or records." Nothing in the statutes permits the chief financial officer or the chief executive officer of a state-chartered credit union to be substituted for the persons specified. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

§ 54-109.12. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.

OPINIONS OF ATTORNEY GENERAL

The provision of § 54-109.11(5) requiring a surety bond of the "treasurer and all other persons handling credit union funds or records" means that the board of directors may require, consistent with administrative rules promulgated by the administrator, an additional surety bond for those having actual possession of or control over credit union funds or financial records. Since the administrator has broad discretion and authority under this section to prescribe rules "relating to financial records, business practices and the conduct and management of credit unions," the administrator can promulgate reasonable guidelines for boards of directors to follow in determining the "amount and character" of the bond to be required. However, it is not within the discretion of a board of directors or the administrator to determine who shall be covered by the bond, other than to identify "persons handling credit union funds or records." See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

§ 54-109.15. Reports.

(a) Credit unions organized under Articles 14A to 14L of this Chapter shall, in January and in July of each year, make a report of condition to the Administrator of Credit Unions on forms supplied for that purpose. Additional reports may be required.

(b) Any credit union that neglects to make semiannual reports as provided in subsection (a) of this section, or any of the other reports required by the Administrator of Credit Unions at the time fixed by the Administrator, shall pay a late penalty to the Administrator of Credit Unions of seventy-five dollars ($75.00) for each day the neglect continues. The Administrator of Credit Unions may revoke the certificate of incorporation and take possession of the assets and business of any credit union failing to pay a penalty imposed under this section after serving notice of at least 15 days upon the credit union of the proposed action. Penalties collected under this section shall be credited to the special account established under G.S. 54-109.14. (1915, c. 115, s. 7; C.S., ss. 5238, 5240; 1925, c. 73, ss. 3, 7, 8; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, ss. 7, 8; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12; 1975, c. 538, s. 1; 1991, c. 651, s. 2.)

ARTICLE 14C.

Powers of Credit Union.

§ 54-109.21. General powers.

A credit union may:

(1) Make contracts;
(2) Sue and be sued;
(3) Adopt and use a common seal and alter the seal;
(4) Acquire, lease, hold and dispose of property, either in whole or in part, necessary or incidental to its operations;
(5) At the discretion of the board of directors, require the payment of an entrance fee or annual membership fee, or both, of any person admitted to membership;
(6) Receive savings from its members in the form of shares, deposits, or special-purpose thrift accounts;
(7) Lend its funds to its members as provided in Articles 14A to 14L of this Chapter;
(8) Borrow from any source in accordance with policy established by the board of directors;
(9) Discount and sell any eligible obligations, subject to rules adopted by the Administrator;
(10) Sell all or substantially all of its assets or purchase all or substantially all of the assets of another financial institution, subject to the approval of the Administrator of Credit Unions;
(11) Invest surplus funds as provided in Articles 14A to 14L of this Chapter;
(12) Make deposits in legally chartered banks, savings institutions, trust companies and central-type credit union organizations;
(13) Assess charges to members in accordance with the bylaws for failure to meet properly their obligations to the credit union;
(14) Hold membership in other credit unions organized under Articles 14A to 14L of this Chapter or other acts, and in other associations and organizations composed of credit unions;
(15) Declare dividends; pay interest on deposits and pay interest refunds to borrowers as provided in Articles 14A to 14L of this Chapter;

(16) Sell travelers checks and money orders and charge a reasonable fee for such services, provided the travelers checks are payable at institutions other than a credit union;

(17) Perform tasks and missions requested by the federal government or this State or any agency or political subdivision thereof, when approved by the board of directors and not inconsistent with Articles 14A to 14L of this Chapter;

(18) Act as fiscal agent for and receive deposits from the federal government, this State, or any agency or political subdivision thereof;

(19) Contribute to, support, or participate in any nonprofit service facility whose services will benefit the credit union or its membership subject to rules adopted by the Administrator;

(20) Make donations or contributions to any civic, charitable or community organization as authorized by the board of directors, subject to such regulations as are prescribed by the Administrator;

(21) Act as a custodian of qualified pension funds if permitted by federal law;

(22) Purchase or make available insurance for its directors, officers, agents, employees, and members; and

(23) Facilitate its members' purchase of goods and services in a manner which promotes the purposes of the credit union.

(24) The board of directors may expel from the corporation any member who has not carried out the engagement the member made with the corporation, has been convicted of a felony or crime involving moral turpitude, or neglects or refuses to comply with the provisions of this Article or of the bylaws. The Board may, after notice and hearing as provided in this subdivision, expel from the corporation any member who because of the member's intemperance disrupts the activities of the credit union or who because of the member's habitual neglect of financial obligations reflects discredit upon the credit union. No member shall be expelled until informed in writing of the charges made and given an opportunity, after reasonable notice, to be heard.

(25) Engage in activity permitted under this subdivision. Notwithstanding any other provision of this Chapter, the Administrator of Credit Unions, subject to the advice and consent of the Credit Union Commission, and upon a finding that action is necessary to preserve and protect the welfare of credit unions and to promote the general economy of the State, may adopt rules allowing State-chartered credit unions to engage in any activity in which they could engage if they were federally chartered credit unions.

(26) Subject to rules adopted by the Administrator, act as trustee or custodian, and receive reasonable compensation for so acting, under any written trust instrument or custodial agreement created or organized and forming a part of a deferred compensation plan for its members or groups or organizations of its members, provided the funds of the plans are invested in savings or deposits of the credit union. All funds held may be commingled for the purpose of investment, but individual records shall be kept by the credit union for each participant and shall show in proper

detail all transactions engaged in under authority of this subdivision.

A member may withdraw from a credit union by filing a written notice of intent to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to the shares and any interest accrued on the deposits to the date of expulsion or withdrawal shall be paid to the member, but in the order of expulsion or withdrawal, and only as funds therefor become available, after deducting any amounts due to the credit union by the member. The member shall have no other or further right in the credit union or to any of its benefits, but the expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the credit union. (1915, c. 115, ss. 5, 16, 17, 23; C.S., ss. 5216-5218, 5231; 1925, c. 73, ss. 3, 10; 1935, c. 87; 1965, c. 956, s. 8; 1975, c. 538, s. 1; 1977, c. 559, s. 5; 1983, c. 568, s. 2; 1991, c. 651, s. 3.)

ARTICLE 14E.

Direction of Affairs.

§ 54-109.44. Duties of directors.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion of the Attorney General cited under this section in the main volume may be found at 59 N.C.A.G. 8 (1989).*

The language of §§ 54-109.11(5) and subdivision (2) of this section relating to blanket surety bonds is mandatory and extends to all state-chartered credit union officers, employees, agents, and others in a position of trust. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

ARTICLE 14F.

Savings Accounts.

§ 54-109.57. Trusts accounts.

(a) Shares may be issued to and deposits received from any person establishing an account who shall execute a written agreement with the credit union containing a statement that it is executed pursuant to the provisions of this subsection and providing for the account to be held in the name of such person as trustee for not more than one person designated as beneficiary, the account and any balance thereof shall be held as a trust account, with the following incidents:

(1) The trustee during the trustee's lifetime may change the designated beneficiary by a written direction to the credit union.

(2) The trustee may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the trustee's personal order. Such payment or withdrawal shall constitute a

revocation of the trust agreement as to the amount withdrawn.

(3) If the beneficiary is living and of legal age at the death of the trustee, the beneficiary shall be the holder of the account, and payment by the credit union to the holder shall be a total discharge of the credit union's obligation as to the amount paid.

(4) If the beneficiary predeceases the trustee, the account shall become an individual account of the trustee and shall have the legal incidents of an individual account.

(5) If the named beneficiary is not of legal age at the death of the trustee, the credit union shall transfer the funds in the account to the general guardian or guardian of the estate, if any, of the minor beneficiary. If no guardian of the minor beneficiary has been appointed, the credit union shall hold the funds in a similar interest bearing account in the name of the minor until the minor reaches the age of majority or until a duly appointed guardian withdraws the funds.

(6) Funds in a trust account established pursuant to this subsection shall belong to the beneficiary upon the death of the trustee and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(1). Payment by the credit union of funds in the trust account to the beneficiary shall terminate the personal representative's authority under G.S. 28A-15-10(a)(1) to collect against the credit union for the funds so paid, but the personal representative's authority to collect such funds from the beneficiary is not terminated.

The person establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following:

"CREDIT UNION (or name of institution)
TRUST ACCOUNT

G.S. 54-109.57

I understand that by establishing a trust account under the provisions of North Carolina General Statute 54-109.57 that:

1. During my lifetime I may withdraw the money in the account; and
2. By written direction to the credit union (or name of institution) I may change the beneficiary; and
3. Upon my death the money remaining in the account will belong to the beneficiary, and the money will not be inherited by my heirs or be controlled by my will.

____________________"

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.

(b) Whenever the beneficiary of a trust account does not survive the trustee, then the account and any balance thereof which exists shall be held by the trustee in the trustee's own right and for the trustee's own use and benefit.

(c) No addition to such accounts, nor any withdrawal, payment, or change of beneficiary shall affect the nature of such accounts as trust accounts, or affect the right of a trustee to terminate the account.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24, relating to the administration of the estate tax laws of this State, or provisions of law relating to estate taxes. (1915, c. 115, s. 14; C.S., s. 5227; 1975, c. 538, s. 1; 1987 (Reg. Sess., 1988), c. 1078, s. 2; 1989, c. 164, s. 6; 1989 (Reg. Sess., 1990), c. 866, s. 8.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 2, which amended this section, became effective July 1, 1989.

§ 54-109.58. Joint accounts.

(a) Shares may be issued to and deposits received from any two or more persons opening or holding an account or accounts, but no joint tenant, unless a member in his own right, shall be permitted to vote, obtain loans, or hold office or be required to pay an entrance or membership fee. The account and any balance thereof shall be held by them as joint tenants, with or without right of survivorship, as the contract shall provide; the account may also be held pursuant to G.S. 41-2.1 and have the incidents set forth in that section, provided, however, if the account is held pursuant to G.S. 41-2.1 the contract shall set forth that fact as well. Unless the persons establishing the account have agreed with the credit union that withdrawals require more than one signature, payment by the credit union to, or on the order of, any persons holding an account authorized by this section shall be a total discharge of the credit union's obligations as to the amount so paid. Funds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant, and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(3), or as provided in G.S. 41-2.1 if the account is established pursuant to the provisions of that section. Payment by the credit union of funds in the joint account to a surviving joint tenant or tenants shall terminate the personal representative's authority under G.S. 28A-15-10(a)(3) to collect against the credit union for the funds so paid, but the personal representative's authority to collect such funds from the surviving joint tenant or tenants is not terminated. A pledge of such account by any holder or holders shall, unless otherwise specifically agreed upon, be a valid pledge and transfer of such account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account. Persons establishing an account under this section shall sign a statement showing their election of the right of survivorship in the account, and containing language set forth in a conspicuous manner and substantially similar to the following:

"CREDIT UNION (or name of institution)
JOINT ACCOUNT WITH RIGHT OF
SURVIVORSHIP

G.S. 54-109.58

We understand that by establishing a joint account under the provisions of North Carolina General Statute 54-109.58 that:

1. The credit union (or name of institution) may pay the money in the account to, or on the order of, any person named in the account unless we have agreed with the credit union that withdrawals require more than one signature; and
2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will.

We DO elect to create the right of survivorship in this account.

____
____________________"

(a1) This section shall not be deemed exclusive. Deposit accounts, not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law as appropriate.

(b) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24, relating to the administration of the estate tax laws of this State, or provisions of laws relating to estate taxes; the provisions herein shall regulate, govern and protect the credit union in its relationship with such joint owners of accounts as herein provided.

(c) No addition to such account, nor any withdrawal or payment shall affect the nature of the account as a joint account, or affect the right of any tenant to terminate the account. (1975, c. 538, s. 1; 1987 (Reg. Sess., 1988), c. 1078, s. 3; 1989, c. 164, s. 3; 1989 (Reg. Sess., 1990), c. 866, s. 7.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 3, which amended this section, became effective July 1, 1989.

CASE NOTES

Cited in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990).

§ 54-109.59. Liens.

CASE NOTES

Statutory lien created by this section is avoidable under federal bankruptcy law. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Funds Deposited as a Result of Credit Union's Unfair and Deceptive Trade Practices. — Credit union was not entitled to assert statutory lien under this section on funds in debtor's share account because those funds were deposited in debtor's share account as result of credit union's unfair and deceptive trade practices. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Lien created by this section becomes effective against debtor only when debtor's financial condition fails to meet a specified financial standard, i.e., when debtor is "past due" with payments to credit union; moreover, if in fact credit union had valid statutory lien on debtor's share account pursuant to this section, then trustee can avoid that lien pursuant to 11 U.S.C. §§ 545(1)(E) and 547(b). Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

§ 54-109.63. Personal agency accounts.

(a) A person may open a personal agency account by written contract containing a statement that it is executed pursuant to the provisions of this section. A personal agency account may be a checking account, savings account, time deposit, or any other type of withdrawable account or certificate. The written contract shall name an agent who shall have authority to act on behalf of the depositor in regard to the account as set out in this subsection. The agent shall have the authority to:

(1) Make, sign or execute checks drawn on the account or otherwise make withdrawals from the account;
(2) Endorse checks made payable to the principal for deposit only into the account; and
(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

A person establishing an account under this section shall sign a statement containing language substantially similar to the following in a conspicuous manner:

"CREDIT UNION (or name of institution)
PERSONAL AGENCY ACCOUNT

G.S. 54-109.63

I understand that by establishing a personal agency account under the provisions of North Carolina General Statute 54-109.63 that the agent named in the account may:

1. Sign checks drawn on the account; and
2. Make deposits into the account.

I also understand that upon my death the money remaining in the account will be controlled by my will or inherited by my heirs.

________________________"

(b) An account created under the provisions of this section grants no ownership right or interest in the agent. Upon the death of the principal there is no right of survivorship to the account and the authority set out in subsection (a) terminates.

(c) The written contract referred to in subsection (a) shall provide that the principal may elect to extend the authority of the agent set out in subsection (a) to act on behalf of the principal in regard to the account notwithstanding the subsequent incapacity or mental incompetence of the principal. If the principal so elects to extend such authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the agent may continue to exercise such authority, without the requirement of bond or of accounting to any court, until such time as the agent shall receive actual knowledge that such authority has been terminated by a duly qualified guardian of the estate of the incapacitated or incompetent principal or by the duly appointed attorney-in-fact for the incapacitated or incompetent principal, acting pursuant to a durable power of attorney (as defined in G.S. 32A-8) which grants to the attorney-in-fact that authority in regard to the account which is granted to the agent by the written contract executed pursuant to the provisions of this section, at which time the agent shall account to such guardian or attorney-in-fact for all actions of the agent in regard to the account during the incapacity or incompetence of the principal. If the principal does not so elect to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the authority or the agent set out in subsection (a) terminates.

(d) When an account under this section has been established all or part of the account or any interest or dividend thereon may be paid by the credit union on a check made, signed or executed by the agent. In the absence of actual knowledge that the principal has died or that the agency created by the account has been terminated, such payment shall be a valid and sufficient discharge to the credit union for payment so made.

(e) An account established under the provisions of this section does not grant to the agent the authority to vote, obtain loans, or hold office and the agent shall not be required to pay an entrance or membership fee. (1987 (Reg. Sess., 1988), c. 1078, s. 4; 1989, c. 164, s. 9; 1989 (Reg. Sess., 1990), c. 866, s. 9.)

ARTICLE 14G.

Loans.

§ 54-109.68. Security.

CASE NOTES

Attempt to Create Security Interest in Retirement Account by Using Deceptive Trade Practices. — Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at time of making first loan (which authorized sending employee's retirement checks to credit union and depositing therein and filing away of these forms and applying them to all loans thereafter made) violated public policy of protecting the retirement accounts of teachers and other state employees, having tendency to deceive them regarding their rights as to their retirement accounts. These acts collectively constitute unfair and deceptive trade practices. As debtor was damaged as a result of such practices (in that he lost ability to use his retirement fund for his own needs, including eventual retirement), he was entitled to recover treble damages and attorneys' fees. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

ARTICLE 14-I.

Investments.

§ 54-109.82. Investment of funds.

The capital, deposits, undivided profits and reserve fund of the corporation may be invested only in any of the following ways:

(1) They may be lent to the members of the corporation in accordance with the provisions of this Chapter.

(2) In capital shares, obligations, or preferred stock issues of any agency or association organized either as a stock company, mutual association, or membership corporation, provided the membership or stockholdings, as the case may be, of the agency or association are confined or restricted to credit unions or organizations of credit unions, or provided the purpose for which the agency or association is organized or designed is to service or otherwise assist credit union operations.

(3) In obligations of the State of North Carolina or any subdivision thereof.

(4) In obligations of the United States, including bonds and securities upon which payment of principal and interest is fully guaranteed by the United States.

(5) They may be deposited to the credit of the corporation in savings institutions, credit unions, or State banks or trust companies incorporated under the laws of the State, or in national banks located in the State.

(6) In loans to other credit unions in any amount not to exceed twenty-five percent (25%) of the shares and unimpaired surplus of the lending credit union.

(7) In an aggregate amount not to exceed twenty-five percent (25%) of the allocations to the reserve fund in any agency or association of the type described in subdivision (2) of this section provided the purposes of the agency or association are designed to assist in establishing and maintaining liquidity, solvency, and security in credit union operations.

(8) In the North Carolina Savings Guaranty Corporation.

(9) In any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(10) Debentures issued by an agency of the United States government.

(11) In the College Foundation in any amount not to exceed ten percent (10%) of the shares and unimpaired surplus of the investing credit union.

(12) They may be deposited in any bank or savings institution insured by the federal government or any of its agencies. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C.S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781; 1965, c. 956, ss. 10, 11; 1969, c. 69, s. 1; 1973, c. 199, s. 4; c. 1255, s. 1; 1975, c. 538, s. 1; 1977, c. 559, s. 7; 1979, c. 467, s. 23; c. 809, s. 2; 1991, c. 651, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 51.11.)

ARTICLE 14M.

Confidential Information.

§ 54-109.105. What information deemed confidential; disclosure; certain information deemed public; exchange of information.

(a) The following records of information of the credit union division, the Administrator or the agent(s) of either shall be confidential and shall not be disclosed:

(1) Information obtained or compiled in preparation of, during, or as a result of an examination, audit or investigation of any credit union;

(2) Information reflecting the specific collateral given by a named borrower, or specific withdrawable accounts held by a named member;

(3) Information obtained, prepared or compiled during or as a result of an examination, audit or investigation of any credit union by an agency of the United States, if the records would be confidential under federal law or regulation;

(4) Information and reports submitted by credit unions to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;

(5) Information and records regarding complaints from the members received by the division which concern credit unions when the complaint would or could result in an investigation, except to the management of those credit unions;

(6) Any other letters, reports, memoranda, recordings, charts or other documents or records which would disclose any information of which disclosure is prohibited in this subsection.

(b) A court of competent jurisdiction may order the disclosure of specific information.

(c) The information contained in an application for a new credit union shall be deemed to be public information.

(d) Nothing in this Article shall prevent the exchange of information relating to credit unions and the business thereof with the representatives of the agencies of this State, other states, or of the United States, or with reserve or insuring agencies for credit unions. Nothing in this Article shall prevent the Administrator, in his discretion, from disclosing pertinent information relating to a credit union and the business thereof with directors, officers, or members of the credit union. The private business and affairs of an individual or company shall not be disclosed by any person employed by the credit union division, or by any person with whom information is exchanged under the authority of this subsection.

(e) Any official or employee violating this section shall be liable to any person injured by disclosure of such confidential information for all damages sustained thereby. Penalties provided shall not be exclusive of other penalties.

(f) The willful or knowing violation of the provisions of this Article by any employee of the credit union division shall be a Class 1 misdemeanor. (1981, c. 512; 1993, c. 539, s. 429; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (f).

ARTICLE 14N.

Foreign Credit Unions.

§ 54-109.106. Foreign Credit Unions.

(a) A credit union organized under the laws of another state or territory of the United States may conduct business as a credit union in this State with the approval of the Administrator, provided credit unions incorporated under Articles 14A through 14M of this Chapter are allowed to do business in the other state under conditions similar to these provisions. Before granting the approval, the Administrator must find that the foreign credit union:

(1) Is a credit union organized under laws similar to Articles 14A through 14M of this Chapter;
(2) Is financially solvent;
(3) Has account insurance through the federal government or any agency thereof;
(4) Is examined and supervised by a regulatory agency of the state in which it is organized;
(5) Will serve a field of membership not being served in this State or to adequately serve its members in this State;
(6) Operation by the credit union will not have adverse impact on the financial, economic or other interests of residents of this State.

(b) No foreign credit union may conduct business in this State unless it:

(1) Makes loans at such terms allowed under the provisions of Article 14G of this Chapter;
(2) Complies with the rules and regulations applicable to credit unions incorporated under Articles 14A through 14M of this Chapter;
(3) Agrees to furnish the Administrator a copy of the report of examination of its regulatory agency and such other documents or reports as may be requested or to submit to an examination as the Administrator deems necessary;
(4) Designates and maintains an agent for the service of process in this State.

(c) The Administrator may deny or revoke approval of a credit union to conduct business in this State if the Administrator finds that:

(1) The credit union fails to meet the requirements of subsection (a);

(2) The credit union fails to comply with the laws of this State or lawful rules or orders issued by the Administrator;

(3) The credit union has engaged in a pattern of unsafe or unsound credit union practices. (1991, c. 271, s. 1.)

Editor's Note. — Session Laws 1991, c. 271, s. 2, made this Article effective October 1, 1991.

SUBCHAPTER V. MARKETING ASSOCIATIONS.

ARTICLE 19.

Purpose and Organization.

§ 54-139. Foreign cooperative corporations; limitation on use of word "cooperative."

(a) A foreign corporation (with or without capital stock) that can qualify as an association, as defined in G.S. 54-130(2)b1 and 2, may be authorized to transact business in this State under the provisions of Chapter 55A of the General Statutes.

(b) No person other than an association organized under this Subchapter, or a foreign corporation authorized to transact business in this State pursuant to subsection (a) of this section, or an electric or telephone membership corporation domesticated pursuant to G.S. 117-28, or an organization created under or governed by Subchapter IV of Chapter 54 of the General Statutes, shall be entitled to organize, domesticate, or transact business in this State if the corporate or other business name or title of such person contains the word "cooperative." (1921, c. 87, s. 21; C.S., s. 5259(k); 1963, c. 1168, s. 8; 1985, c. 542, s. 8; 1993, c. 552, s. 20.)

§ 54-142. Application of North Carolina Business Corporation Act to cooperative associations with capital stock.

The provisions of the North Carolina Business Corporation Act (Chapter 55 of the General Statutes) shall apply, so far as appropriate, to every cooperative association with capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1921, c. 87, s. 28; C.S., s. 5259(o); 1963, c. 1168, s. 9; 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

ARTICLE 21.

Powers, Duties, and Liabilities.

§ 54-157. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.

Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a Class 2 misdemeanor and subject only to a fine of not less than one hundred dollars ($100.00), and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500.00) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness, or to any communication, written or oral, between a business company or concern and persons with whom it has an existing contractual relationship which communication relates to the performance of that contractual relationship and duties and responsibilities arising therefrom. (1921, c. 87, s. 25; C.S., s. 5259(dd); 1963, c. 1168, s. 14; 1993, c. 539, s. 430; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 2" preceding "misdemeanor" and inserted "only" following "subject".

ARTICLE 22.

Merger, Consolidation and Other Fundamental Changes.

§ 54-166. Rights of objecting members.

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

Chapter 54B.

Savings and Loan Associations.

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ARTICLE 3.

Fundamental Changes.

§ 54B-34.1. Conversion to State association.

(a) A savings bank or State or national bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a State association and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to convert to a State association, the Administrator shall examine all facts connected with the conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator's objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by a majority of the votes or shares present, in person or by proxy. Following the vote of the members or stockholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a State association. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 5.)

Editor's Note. — Session Laws 1993, c. 163, s. 7 made this section effective October 1, 1993.

§ 54B-34.2. Conversion to bank.

(a) A savings and loan association, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a bank, as defined under G.S. 53-1(1), or to a national bank or other form of depository institution and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to so convert, the Administrator shall examine all facts connected with the conversion including receipt of approval of the converting institution's plan of conversion by other federal or state regulatory agencies having jurisdiction over the institution upon completion of its conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator's objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by the members or the shareholders at a duly called and properly convened meeting of the members or shareholders. Following the meeting of the members or shareholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a bank, national bank, or other form of depository institution. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 5.)

Editor's Note. — Session Laws 1993, c. 163, s. 7 made this section effective October 1, 1993.

§ 54B-37.1. Simultaneous conversion/merger.

(a) The Administrator shall not approve any application for the conversion of an association from mutual to stock form and its simultaneous (i) merger into a stock-owned savings institution or bank or (ii) acquisition by an operating financial institution holding company except as authorized in subsection (b) of this section. As used in this section, "simultaneous conversion/merger" shall mean a transaction in which the members of a mutual association proposing to convert to stock form are offered the opportunity to purchase (i) stock in the savings institution or bank into which it will be merged or (ii) stock in the holding company by which it will be acquired.

(b) The Administrator shall approve a plan of simultaneous conversion/merger only if:

(1) The transaction is proposed to address supervisory concerns of the Administrator as to the safety and soundness of the mutual association; or

(2) The mutual association:

a. Operates in a local market area in which long-term trends make reasonable growth, continued profitability, and safe and sound operation appear unlikely;

b. Furnishes evidence concerning its asset size, capital to assets ratio, and other factors, which may include a cost/benefit analysis, satisfactory to the Administrator that a simultaneous conversion/merger is more likely than remaining independent, merging with a mutual institution, converting to stock ownership, or other alternatives available to the association, to result in deposit, credit, and other financial services being provided within the local community safely and soundly on a long-term basis; and

c. Furnishes evidence satisfactory to the Administrator that no director, officer, or other person associated with the parties to the proposed transaction will receive benefits as a result of the simultaneous conversion/merger which in the aggregate exceed those permitted under federal regulations governing similar transactions.

(c) The Administrator may adopt rules to govern simultaneous conversion/mergers, which rules shall contain restrictions or limitations which equal or exceed the limitations or restrictions contained in the rules of federal regulatory agencies governing similar transactions. No plan of a simultaneous conversion/merger shall be approved by the Administrator unless it includes notification by first class mail to the members of the association to be acquired explaining the details of the plan including economic benefits or incentives to be received by officers and directors of the association, if any. Shares of stock in the acquiring entity purchased at a discount or otherwise by members of the association as part of the simultaneous conversion/merger shall be without limitation on subsequent sales by such members: provided, however, rules adopted by the Administrator may place limitations of the sale of such stock purchased by officers and directors of the association. (1995, c. 479, s. 4.)

Editor's Note. — Session Laws 1995, c. 479, s. 8, made this section effective upon ratification. The Act was ratified July 26, 1995.

ARTICLE 4.

Supervision and Regulation.

§ 54B-56. Examinations by Administrator; report.

(a) If at any time the Administrator deems it prudent, it shall be his duty to examine and investigate everything relating to the business of a State association or a savings and loan holding company, and to appoint a suitable and competent person to make such investigation, who shall file with the Administrator a full report of his finding in such case, including in his report any violation of law or any unauthorized or unsafe practices of the association disclosed by his examination.

(b) The Administrator shall furnish a copy of the report to the association examined and may, upon request, furnish a copy of or excerpts from the report to the appropriate federal regulatory authorities.

(c) No association may willfully delay or willfully obstruct an examination in any fashion. Any person failing to comply with this subsection shall be guilty of a Class 1 misdemeanor.

(d) No person having in his possession or control any books, accounts or papers of any State association shall refuse to exhibit same to the Administrator or his agents on demand, or shall knowingly or willingly make any false statement in regard to the same. Any person failing to comply with this subsection shall be guilty of a Class 1 misdemeanor. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 5; 1993, c. 539, ss. 431, 432; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsections (c) and (d).

§ 54B-63.1. Confidential records.

(a) As used in this section:

(1) "Compliance review committee" means:

a. An audit, loan review, or compliance committee appointed by the board of directors of an association or any other person to the extent the person acts at the direction of or reports to a compliance review committee; and

b. Whose functions are to audit, evaluate, report, or determine compliance with any of the following:

1. Loan underwriting standards;
2. Asset quality;
3. Financial reporting to federal or State regulatory agencies;
4. Adherence to the association's investment, lending, accounting, ethical, and financial standards; or

5. Compliance with federal or State statutory requirements.

(2) "Compliance review documents" means documents prepared for or created by a compliance review committee.

(3) "Loan review committee" means a person or group of persons who, on behalf of an association, reviews assets, including loans held by the association, for the purpose of assessing the credit quality of the loans or the loan application process, compliance with the association's investment and loan policies, and compliance with applicable laws and regulations.

(4) "Person" means an individual, group of individuals, board, committee, partnership, firm, association, corporation, or other entity.

(b) Associations chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State association regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of an association or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against an association, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence. (1995, c. 408, s. 2.)

Editor's Note. — Session Laws 1995, c. 408, s. 4, made this section effective upon ratification. The Act was ratified July 10, 1995.

§ 54B-66. Criminal penalties.

(a) The provisions of this section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following shall be deemed to be Class 1 misdemeanors:

(1) The willful or knowing violation of the provisions of this Article by any employee of the Savings Institutions Division.

(2) The willful or knowing violation of a cease and desist order which has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false shall be deemed to be a Class 1 misdemeanor. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Administrator is authorized to enforce this section in a court of competent jurisdiction. (1981, c. 282, s. 3; 1989, c. 76, s. 22; 1993, c. 539, s. 433; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanors" for "misdemeanors and shall be punishable as provided in Chapter 14 of the North Carolina General Statutes" in subsection (b) and "Class 1 misdemeanor" for "misdemeanor and shall be punishable as provided in Chapter 14 of the North Carolina General Statutes" in subsection (c).

§ 54B-75. Statement; fees.

Every State association shall file in the office of the Administrator, on or before the first day of February in each year, in such form as the Administrator shall prescribe, a statement of the business standing and financial condition of such association on the preceding 31st day of December. This statement shall be signed and sworn to by the secretary or other officer duly authorized by the board of directors of the association before a notary public. The statement shall be accompanied by a filing fee set by the Administrator, subject to the advice and consent of the Commission. The filing fees shall be used to defray the expenses incurred by the Division in supervising State associations. (1981, c. 282, s. 3; 1985, c. 659, s. 12; 1993, c. 163, s. 1.)

§ 54B-76. Statement examined, approved, and published.

It shall be the duty of the Administrator to receive and thoroughly examine each annual statement required by G.S. 54B-75, and if made in compliance with the requirements thereof, each State association shall at its own expense, publish an abstract of the same in a newspaper having general circulation within each market area of the association as selected by the managing officer. (1981, c. 282, s. 3; 1993, c. 163, s. 2.)

§ 54B-78. Prohibited practices.

Any person or association who shall engage in any of the following acts or practices shall be guilty of a Class 1 misdemeanor:

(1) Defamation: Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of any oral, written, or printed statement which is false regarding the financial condition of any association.

(2) False information and advertising: Making, publishing, disseminating, or circulating or causing, directly or indirectly, to be made published, disseminated, circulated, or otherwise placed before the public in any publication, media, notice, pamphlet, letter, poster, or any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the savings and loan business or with respect to any person in the conduct of the savings and loan business which is

untrue, deceptive, or misleading. (1985, c. 659, s. 13; 1993, c. 539, s. 434; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court".

ARTICLE 13.

Savings and Loan Holding Companies.

§§ 54B-263, 54B-264: Reserved for future codification purposes.

ARTICLE 14.

Savings and Loan Interstate Branches.

§ 54B-265. Title.

This Article shall be known and may be cited as the North Carolina Savings and Loan Interstate Branch Act. (1993, c. 191, s. 2.)

Editor's Note. — Session Laws 1993, c. 191, s. 4 made this Article effective October 1, 1993.

§ 54B-266. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Administrator" means the Administrator of the Savings Institution Division.

(2) "Association" means a savings and loan association and includes a State association or a federal association unless limited by use of the words "State" or "federal".

(3) "Branch" means a full-service office of an association through which it renders a savings and loan service other than its principal office. An association may engage in any authorized function or service through an authorized branch office.

(4) "Commission" means the North Carolina Savings Institution Commission.

(5) "Home state" means (i) as to a state association, the state which granted the association its charter, and (ii) as to a federal association, the state in which the association has its principal office.

(6) "Out-of-state association" means an association chartered by any state other than this State and whose principal office is not within this State.

(7) "State association" means an association chartered under the laws of this State.

(8) "Supervisor" means the state association supervisor or equivalent state official having primary regulatory authority over an out-of-state association. (1993, c. 191, s. 2.)

§ 54B-267. Establishment of branches by out-of-state associations.

Any out-of-state association that meets the requirements of this Article may establish a branch within North Carolina either by (i) de novo entry; (ii) the purchase of an existing branch; (iii) the purchase of all or substantially all of the assets of a State association located in North Carolina; or (iv) merger or consolidation. (1993, c. 191, s. 2.)

§ 54B-268. Application requirements.

(a) Any out-of-state association desiring to establish a branch office under this Article shall file with the Administrator a written application meeting the following requirements:

(1) The out-of-state association shall agree to comply with all the applicable rules and regulations, and informational filing requirements contained in the laws and rules of this State that would apply to a State association engaging in an equivalent form of transaction. Additionally, the Administrator shall apply the same standards of approval to the application of the out-of-state association as would apply to an application by a State association for an equivalent form of transaction.

(2) The out-of-state association shall provide the Administrator, in the manner prescribed by the Administrator, with such additional information as the Administrator deems necessary, to fully evaluate the application.

(3) The out-of-state association shall pay an application fee established by the Administrator pursuant to G.S. 54B-9.

(4) The out-of-state association shall not commence operations of the branch office until it has received the written approval of the Administrator.

(b) The Administrator shall act on the application within 90 days of receipt of the completed application. (1993, c. 191, s. 2.)

§ 54B-269. Conditions for approval.

No application by an out-of-state association received under this Article may be finally approved by the Administrator unless:

(1) The Administrator has received in writing approval of the proposed transaction from the supervisor of the out-of-state association;

(2) The supervisor of the out-of-state association agrees in writing to share with the Administrator examination reports prepared by the supervisor and any other information deemed necessary by the Administrator regarding the out-of-state association;

(3) The out-of-state association agrees in writing to make available to the Administrator all information that may be required to effectively examine the association;

(4) The out-of-state association agrees in writing that so long as it maintains a branch in North Carolina, it will meet the conditions set forth in this Article and comply with all applicable North Carolina laws and any rules issued thereunder, as well as any orders or directives issued to the association by the Administrator;

(5) The home state of the out-of-state association permits associations chartered under the laws of this State to establish branches within its border; and

(6) The out-of-state association designates and files with the Office of the Secretary of State a document appointing an agent in this State to receive service of judicial process. (1993, c. 191, s. 2.)

§ 54B-270. Special conditions.

(a) The Administrator may require an out-of-state association to designate one of its branches in North Carolina as a "headquarters branch" and may, by rule, require that reports, books, and records required of associations doing business under this Article be available at the designated headquarters branch.

(b) Once an out-of-state association has established at least one branch in North Carolina pursuant to this Article, subsequent applications to establish additional branches shall be considered on the same basis as an application of a State association to establish an additional branch pursuant to G.S. 54B-22.

(c) If an out-of-state association establishes a branch or branches by merger with or purchase from an association located in this State, and the out-of-state association and the association located in this State are both owned by the same holding company, any conditions, limitations, or restrictions placed on the holding company, pursuant to Articles 3A and 13 of this Chapter, shall continue to apply to both the acquiring out-of-state association and its holding company. (1993, c. 191, s. 2.)

§ 54B-271. Powers.

An out-of-state association that establishes a branch in North Carolina may engage in all the activities authorized by North Carolina law for a State association except to the extent that such activities have been expressly prohibited by the state supervisor of the out-of-state association or the laws of the out-of-state association's home state. (1993, c. 191, s. 2.)

§ 54B-272. Establishment of out-of-state branches by state associations.

With the prior consent of the Administrator, any association chartered under the laws of North Carolina may establish a branch in any other state in accordance with the laws of such other state. (1993, c. 191, s. 2.)

§ 54B-273. Regulatory and supervisory oversight.

(a) The Administrator may enter into such agreements as necessary regarding the scope, timing, coordination, and frequency of examinations and other supervisory matters, including the sharing of information gathered in such examinations, with other supervisors and federal association regulators. This authority applies to both out-of-state associations and their holding companies.

(b) The Administrator may require periodic reports on the financial condition of any out-of-state association or its holding company that maintains a branch within North Carolina and may from time to time require from any such out-of-state associations other reports under oath in such scope and detail as the Administrator may reasonably determine to be necessary for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Administrator may, if necessary, conduct full-scope, on-site examinations of any branch established pursuant to this Article.

(d) Out-of-state associations shall be assessed and required to pay supervisory and examination fees in accordance with G.S. 54B-57 and the rules issued thereunder. (1993, c. 191, s. 2.)

§ 54B-274. Enforcement.

(a) Any enforcement authority available to the Administrator for use against a State association may, subject to the provisions of Chapter 150B of the General Statutes, be used against a branch established under this Article and against the out-of-state association or its parent holding company establishing such branch.

(b) The Administrator may suspend or revoke the authority of an out-of-state association to establish or maintain a branch in North Carolina upon a finding of fact or condition or circumstance that is grounds for denial of an application to establish and maintain a branch under this Article.

(c) The Administrator may enforce the provisions of this Article through an action in any court of North Carolina or any other state or any court of the United States as provided in G.S. 54B-64, 54B-65, 54B-66, and 54B-68 for the purpose of obtaining an appropriate remedy for violation of any provisions of this Article.

(d) The Administrator may enter into joint actions with other supervisors or federal association regulators, or both, having concurrent jurisdiction over any out-of-state association that has a branch in North Carolina or over any State association that has a branch in another state, or may take such action independently to carry out the Administrator's responsibilities under this Article and assure compliance with the provisions of this Article and the applicable association laws of this State. (1993, c. 191, s. 2.)

§ 54B-275. Branch closings.

An out-of-state association that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any State association that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch, and that complies with all

North Carolina laws and all other applicable laws regarding the closing of the branch. (1993, c. 191, s. 2.)

§ 54B-276. Rules.

The Commission may adopt rules as necessary to carry out the provisions of this Article. (1993, c. 191, s. 2.)

§ 54B-277. Appeal of administrator's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Administrator, appeal such decision to the Commission. The Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Administrator's decision. Failure of the Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Commission approving the decision of the Administrator. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 54B-16. (1993, c. 191, s. 2.)

§ 54B-278. Severability.

If any provision of this Article or the application of such provision to any persons or circumstances is found invalid, the remainder of this Article and its application to persons or circumstances other than those as to which it is held invalid, shall not be affected. (1993, c. 191, s. 2.)

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ARTICLE 1.

General Provisions.

§ 54C-4. Definitions and application of terms.

(a) Except with respect to this Chapter and Chapter 54B, the term "savings and loan association" when used in the General Statutes shall include savings banks chartered under this Chapter.

(b) Unless the context otherwise requires, the following definitions apply in this Chapter:

(1) Administrator. — The Administrator of the Savings Institution Division.

(2) Affiliate. — Any person or corporation that controls, is controlled by, or is under common control with a savings institution.

(3) Associate. — Any person's relationship with (i) any corporation or organization, other than the applicant or a majority-owned subsidiary of the applicant, of which the person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities, (ii) any trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse who lives in the same house as that person, or any relative of that person's spouse who lives in the same house as that person, or who is a director or officer of the applicant or any of its parents or subsidiaries.

(4) Association. — A savings and loan association as defined by G.S. 54B-4(b)(5).

(5) Branch office. — An office of a savings bank, other than its principal office, that renders savings institution services.

(6) Capital stock. — Securities that represent ownership of a stock savings bank.

(7) Certificate of incorporation or charter. — The document that represents the corporate existence of a State savings bank.

(8) Commission. — The North Carolina Savings Institutions Commission.

(9) Conflict of interest. — A matter before the board of directors in which one or more of the directors, officers, or employees has a direct or indirect financial interest in its outcome.

(10) Control. — The power, directly or indirectly, to direct the management or policies of a savings bank or to vote twenty-five percent (25%) or more of any class of voting securities for a savings bank.

(11) Depository institution. — A person, firm, or corporation engaged in the business of receiving, soliciting, or accepting money or its equivalent on deposit, or of lending money or its equivalent, or of both.

(12) Disinterested directors. — Those directors who have absolutely no direct or indirect financial interest in the matter before them.

(13) Dividends on stock. — The earnings of a savings bank paid out to holders of capital stock in a stock savings bank.

(14) Division. — The Savings Institutions Division.

(15) Examination and investigation. — A supervisory inspection of a savings bank or proposed savings bank that may include inspection of every relevant piece of information including subsidiary or affiliated businesses.

(16) Immediate family. — One's spouse, father, mother, children, brothers, sisters, and grandchildren; and the father, mother, brothers, and sisters of one's spouse; and the spouse of one's child, brother, or sister.

(17) Insurance of deposit accounts. — Insurance on a savings bank's deposit accounts when the beneficiary is the holder of the insured account.

(18) Loan production office. — An office of a savings bank other than the principal or branch offices whose activities are limited to the generation of loans.

(19) Members. — Deposit account holders and borrowers in a State mutual savings bank.

(20) Mutual savings bank. — A savings bank owned by members of the savings bank and organized under this Chapter.

(21) Net worth. — A savings bank's total assets less total liabilities as defined by generally accepted accounting principles plus unallocated, general loan loss reserves.

(22) Original incorporators. — One or more natural persons who are the organizers of a State savings bank responsible for the business of a proposed savings bank from the filing of the application to the Commission's final decision on the application.

(23) Plan of conversion. — A detailed outline of the procedure of the conversion of a savings institution from one to another regulatory authority, from one to another form of ownership, or from one to another charter.

(24) Principal office. — The office that houses the headquarters of a savings bank.

(25) Proposed savings bank. — An entity in organizational procedures before the Commission's final decision on its charter application.

(26) Registered agent. — The person named in the certificate of incorporation upon whom service of legal process is deemed binding upon the savings bank.

(27) Savings bank. — A State savings bank or a federal savings bank, unless limited by use of the words "State" or "federal".

(28) Savings institution. — Either an association or a savings bank.

(29) Service corporation. — A corporation operating under Article 7 of this Chapter that engages in activities determined by the rules of the Administrator to be incidental to the conduct of a depository institution business as provided in this Chapter, or engages in activities that further or facilitate the corporate purposes of a savings bank, or furnishes services to a savings bank or subsidiaries of a savings bank, the voting stock of which is owned directly or indirectly by one or more savings institutions.

(30) State savings bank. — A depository institution organized and operated under this Chapter; or a corporation organized under federal law and so converted as to be operated under this Chapter.

(31) Stock savings bank. — A savings bank owned by holders of capital stock and organized under this Chapter.

(32) Voluntary dissolution. — The dissolution and liquidation of a savings bank initiated by its ownership. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 4.)

ARTICLE 2.

Incorporation and Organization.

§ 54C-9. Application to organize a savings bank.

(a) The original incorporators, a majority of whom shall be domiciled in this State, may organize and establish a savings bank in order to promote the purposes of this Chapter, subject to approval as provided in this Chapter. The original incorporators shall file with the Administrator a preliminary application to organize a State savings bank in the form to be prescribed by the Administrator, together with the proper nonrefundable application fee.

(b) The Administrator shall receive the application to organize a State savings bank not less than 60 days before the scheduled consideration of the application by the Commission. The application shall contain the following:

(1) The original of the certificate of incorporation, which shall be signed by the original incorporators, or a majority of them, and shall be properly acknowledged by a person duly authorized by this State to take proof or acknowledgment of deeds; and two conformed copies;

(2) The names and addresses of the incorporators; and the names and addresses of the initial members of the board of directors;

(3) Statements of the anticipated receipts, expenditures, earnings, and financial condition of the savings bank for its first three years of operation, or any longer period as the Administrator may require;

(4) A showing satisfactory to the Commission that:

  a. The public convenience and advantage will be served by the establishment of the proposed savings bank;

  b. There is a reasonable demand and necessity in the community that will be served by the establishment of the proposed savings bank;

  c. The proposed savings bank will have a reasonable probability of sustaining profitable and beneficial operations within a reasonable time in the community in which the proposed savings bank intends to locate;

  d. The proposed savings bank, if established, will promote healthy and effective competition in the community in the delivery to the public of savings institution services;

(5) The proposed bylaws; and

(6) Statements, exhibits, maps, and other data that may be prescribed or requested by the Administrator, which data shall be sufficiently detailed and comprehensive so as to enable the Administrator to pass upon the criteria set forth in this Article.

(c) The application shall be signed by the original incorporators, or a majority of them, and shall be properly acknowledged by a person duly authorized by this State to take proof and acknowledgment of deeds. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 5.)

§ 54C-26. Branch offices closed.

The Board of a State savings bank may discontinue the operation of a branch office upon giving at least 90 days prior written notice to the Administrator and depositors, the notice to include the date upon which the branch office shall be closed. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 6.)

ARTICLE 3.

Corporate Changes.

§ 54C-30. Conversion to savings bank.

(a) An association or State or national bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a State savings bank and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to convert to a State savings bank, the Administrator shall examine all facts connected with the conversion. The depository institution applying for permission to convert shall pay all the expenses and cost of the examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend the plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by a majority of the votes or shares present, in person or by proxy. Following the vote of the members or stockholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a State savings bank. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 7.)

§ 54C-33. Conversion of mutual to stock savings bank.

(a) A mutual savings bank may convert from mutual to the stock form of ownership as provided in this section.

(b) A mutual savings bank may apply to the Administrator for permission to convert to a stock savings bank and for certification of appropriate amendments to the savings bank's certificate of incorporation. Upon receipt of an application to convert from mutual to stock form the Administrator shall examine all facts connected with the requested conversion. The savings bank applying for permission to convert shall pay all expenses and cost of the examination, monitoring, and supervision.

(c) The savings bank shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment, if it appears that:

(1) After conversion the savings bank will be in sound financial condition and will be soundly managed;
(2) The conversion will not impair the capital of the savings bank nor adversely affect the savings bank's operations;
(3) The conversion will be fair and equitable to the members of the savings bank and no person whether member, employee, or otherwise, will receive any inequitable gain or advantage by reason of the conversion;
(4) The savings bank services provided to the public by the savings bank will not be adversely affected by the conversion;
(5) The substance of the plan has been approved by a vote of two-thirds of the board of directors of the savings bank;
(6) All shares of stock issued in connection with the conversion are offered first to the members of the savings bank; except that any one or more tax qualified employee stock benefit plans may first purchase in the aggregate not more than ten percent (10%) of the total offering of shares;
(7) All stock shall be offered to members of the savings bank and others in prescribed amounts and otherwise under a formula and procedure that is fair and equitable and will be fairly disclosed to all interested persons; and
(8) The plan provides a statement as to whether stockholders shall have preemptive rights to acquire additional or treasury shares of the savings bank.

If the Administrator approves the plan, then the plan shall be submitted to the members as provided in subsection (d) of this section. If the Administrator refuses to approve the plan, the Administrator shall state the objections in writing and give the converting savings bank an opportunity to amend the plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(d) After lawful notice to the members of the savings bank and full and fair disclosure, the substance of the plan shall be approved by a majority of the total votes that members of the savings bank are eligible and entitled to cast. The vote by the members may be in person or by proxy. Following the vote of the members, the results of the vote certified by an appropriate officer of the savings bank shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the savings bank's approved plan of conversion.

(e) Any rules that the Administrator may adopt to govern conversions shall equal or exceed the requirements for conversion, if any, imposed by the federal insurer of deposit accounts. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 8.)

§ 54C-35. Merger of like savings banks.

Any two or more mutual savings banks or any two or more stock savings banks organized and operating, may merge or consolidate into a single savings bank. The procedure to effect the merger is as follows:

(1) The directors, or a majority of them, of the savings banks that desire to merge may, at separate meetings, enter into a written agreement of merger signed by them and under the corporate seals of the respective savings banks specifying each savings bank to be merged and the savings bank that is to receive into itself the merging savings bank or banks, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. The merger agreement may provide other provisions with respect to the merger as appear necessary or desirable, or as the Administrator may require.

(2) The merger agreement together with copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective savings banks shall be submitted to the Administrator, who shall cause a careful investigation and examination to be made of the affairs of the savings banks proposing to merge, including a determination of their respective assets and liabilities. Each savings bank that is investigated and examined shall pay the cost and expense for the examination. If, as a result of the investigation, the Administrator concludes that the members or stockholders of each of the savings banks proposing to merge will be benefited by the merger, the Administrator shall, in writing, approve the merger. If the Administrator deems that the proposed merger will not be in the interest of all members or stockholders of the savings banks so merging, the Administrator shall, in writing, disapprove the merger. If the Administrator approves the merger agreement, then it shall be submitted, within 45 days after notice to the savings banks of the approval, to the members or stockholders of each savings bank, as provided in subdivision (3) of this section. The savings bank may appeal the disapproval of the merger to the Commission.

(3) A special meeting of the members or stockholders of each of the savings banks shall be held separately upon notice of not less than 20 days to members or stockholders of each savings bank. The notice of meeting shall specify the time, place, and purpose of such meeting. Notice shall be given to members of each mutual savings bank in accordance with the methods specified in its charter and bylaws and by one or more of the following methods: (i) personal service or (ii) postage prepaid mail to the last address of each member appearing upon the records of the savings bank. Provided; however, with respect to a merger of two mutual savings banks, as an alternative to the methods of notice specified above, the mutual savings bank which is to be the surviving savings bank of the proposed merger may provide the notice of meeting by publication of notice at least once a week for four consecutive weeks in one or more newspapers

in general circulation in the county or counties in which the savings bank has its principal and any branch offices. Notice shall be given to stockholders of each stock-owned savings bank in accordance with the method specified for a meeting of stockholders in its charter and bylaws. The secretary or other officer of each savings bank shall make proof by certification at such meeting of the due service of the notice or call for said meeting.

(4) At separate meetings of the members or stockholders of the respective savings banks, the members or stockholders may adopt, by an affirmative vote of a majority of the votes or shares present, in person or by proxy, a resolution to merge into a single savings bank upon the terms of the merger agreement as shall have been agreed upon by the directors of the respective savings banks and as approved by the Administrator. Upon the adoption of the resolution, a copy of the minutes of the proceedings of the meetings of the members or stockholders of the respective savings banks, certified by an appropriate officer of the merging savings banks, shall be filed in the office of the Administrator. Within 15 days after the receipt of a certified copy of the minutes of the meetings, the Administrator shall either approve or disapprove the proceedings for compliance with this section. If the Administrator approves the proceedings, the Administrator shall issue a certificate of approval of the merger. The certificate shall be filed and recorded in the office of the Secretary of State. When the certificate is so filed, the merger agreement shall take effect according to its terms and is binding upon all the members or stockholders of the savings banks merging, and it is deemed to be the act of merger of the constituent savings banks under the laws of this State, and the certificate or certified copy thereof is evidence of the agreement and act of merger of the savings banks and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to the merger. Within 60 days after its receipt from the Secretary of State, the certified copy of the certificate shall be filed with the register of deeds of the county or counties in which the respective savings banks so merged have recorded their original certificates of incorporation. Failure to so file shall subject the savings bank to only a penalty of one hundred dollars ($100.00) to be collected by the Secretary of State. If the Administrator disapproves the proceedings, the Administrator shall issue a written statement of the reasons for the disapproval and notify the savings banks to that effect. The savings banks may appeal the disapproval to the Commission.

(5) Upon the merger of any savings bank, as above provided, into another:

a. Its corporate existence is merged into that of the receiving savings bank; and all its right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the receiving savings bank, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held, or enjoyed by the savings banks so merged; and the receiving savings bank shall absorb fully and completely the savings bank or banks so merged.

b. Its rights, liabilities, obligations, and relations to any person shall remain unchanged and the savings bank into which it has been merged shall, by the merger, succeed to all the relations, obligations, and liabilities as though it had itself assumed or incurred the same. No obligation or liability of a member, customer, or stockholder in a savings bank that is a party to the merger shall be affected by the merger, but obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement.

c. A pending action or other judicial proceeding to which a savings bank that is so merged is a party, is not deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order, or decree in the same manner as if the merger had not been made; or the receiving savings bank may be substituted as a party to the action or proceeding, and any judgment, order, or decree may be rendered for or against it that might have been rendered for or against the other savings bank if the merger had not occurred.

(6) Notwithstanding any other provision of this section, the Administrator may waive any or all of the foregoing requirements upon finding that waiver would be in the best interest of the members or stockholders of the merging savings banks. (1991, c. 680, s. 1; 1995, c. 479, s. 5.)

Effect of Amendments. — The 1995 amendment, effective July 26, 1995, rewrote subdivision (3).

§ 54C-36. Simultaneous conversion/merger.

(a) The Administrator shall not approve any application for the conversion of a savings bank from mutual to stock form and its simultaneous (i) merger into a stock-owned savings institution or bank or (ii) acquisition by an operating financial institution holding company except as authorized in subsection (b) of this section. As used in this section, "simultaneous conversion/merger" shall mean a transaction in which the members of a mutual savings bank proposing to convert to stock form are offered the opportunity to purchase (i) stock in the savings institution or bank into which it will be merged or (ii) stock in the holding company by which it will be acquired.

(b) The Administrator shall approve a plan of simultaneous conversion/merger only if:

(1) The transaction is proposed to address supervisory concerns of the Administrator as to the safety and soundness of the mutual savings bank; or

(2) The mutual savings bank:

- a. Operates in a local market area in which long-term trends make reasonable growth, continued profitability, and safe and sound operation appear unlikely;
- b. Furnishes evidence concerning its asset size, capital to assets ratio, and other factors, which may include a cost/benefit analysis, satisfactory to the Administrator that a simultaneous conversion/merger is more likely than remaining independent, merging with a mutual institution, converting to stock ownership, or other alternatives available to the savings bank to result in deposit, credit, and other financial services being provided within the local community safely and soundly on a long-term basis; and
- c. Furnishes evidence satisfactory to the Administrator that no director, officer, or other person associated with the parties to the proposed transaction will receive benefits as a result of the simultaneous conversion/merger which in the aggregate exceed those permitted under the federal regulations governing similar transactions.

(c) The Administrator may adopt rules to govern simultaneous conversion/mergers, which rules shall contain restrictions or limitations which equal or exceed the limitations or restrictions contained in the rules of federal regulatory agencies governing similar transactions. No plan of a simultaneous conversion/merger shall be approved by the Administrator unless it includes notification by first class mail to the members of the savings bank to be acquired explaining the plan including economic benefits or incentives to be received by officers and directors of the association, if any. Shares of stock in the acquiring entity purchased at a discount or otherwise by members of the savings bank as part of the simultaneous conversion/merger shall be without limitation on subsequent sales by such members: provided, however, rules adopted by the Administrator may place limitations of the sale of such stock purchased by officers and directors of the savings bank. (1991, c. 680, s. 1; 1995, c. 479, s. 6.)

Effect of Amendments. — The 1995 amendment, effective July 26, 1995, rewrote the catchline of this section, which formerly read "Merger of savings banks where ownership is converted", and rewrote the text of this section.

§ 54C-40. Merger of savings banks with banks and associations.

(a) A State savings bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to merge with any bank, as defined in G.S. 53-1, or any association, as defined in G.S. 54B-4.

(b) The State savings bank shall submit a plan of merger as a part of the application to the Administrator. The Administrator may recommend approval of the plan of merger with or without amendment.

If the Administrator approves the plan, then the plan shall be submitted to the stockholders or members as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator shall state the objections in writing and give the merging savings bank an opportunity to amend the plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the stockholders or members of the savings bank and full and fair disclosure, the substance of the plan shall be approved by a majority of the total votes that stockholders or members of the savings bank are eligible and entitled to cast. The vote by the stockholders or members may be in person or by proxy. Following the vote of the stockholders or members, the results of the vote certified by an appropriate officer of the savings bank shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested merger.

(d) A merger between a mutual savings bank and a mutual savings and loan association shall be conducted in accordance with the provisions of G.S. 54C-35. (1991, c. 680, s. 1; 1995, c. 479, s. 7.)

Effect of Amendments. — The 1995 amendment, effective July 26, 1995, added subsection (d).

§ 54C-47. Conversion to bank.

(a) A State savings bank, upon a majority vote of its board of directors, may apply to the Administrator for permission to convert to a bank, as defined under G.S. 53-1(1), or to a national bank or other form of depository institution and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to so convert, the Administrator shall examine all facts connected with the conversion, including receipt of approval of the converting institution's plan of conversion by other federal or state regulatory agencies having jurisdiction over the institution upon completion of its conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Administrator. The Administrator may approve it with or without amendment. If the Administrator approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Administrator refuses to approve the plan, the Administrator's objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Administrator's decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by the members or the shareholders at a duly called and properly convened meeting of the members or shareholders. Following the meeting of the members or shareholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Administrator. The Administrator shall then either approve or disapprove the requested conversion to a bank, national bank, or other form of depository institution. After approval of the conversion, the Administrator shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 6.)

Editor's Note. — Session Laws 1993, c. 163, s. 7 made this section effective October 1, 1993.

§§ 54C-48 through 54C-51: Reserved for future codification purposes.

ARTICLE 4.

Supervision.

§ 54C-54. Examinations by Administrator; report.

(a) It is the Administrator's duty, if at any time the Administrator deems it prudent, to examine and investigate everything relating to the business of a State savings bank or a holding company thereof, and to appoint a suitable and competent person to make the investigation. The investigator shall file with the Administrator a full report of the findings in the case, including any violation of law or any unauthorized or unsafe practices of the savings bank disclosed by the examination.

(b) The Administrator shall furnish a copy of the report to the savings bank examined and may, upon request, furnish a copy of, or excerpts from, the report to the insurer of accounts.

(c) No savings bank may willfully delay or willfully obstruct an examination in any fashion. A person failing to comply with this subsection is guilty of a Class 1 misdemeanor.

(d) No person who possesses or controls any books, accounts, or papers of any State savings bank shall refuse to exhibit same to the Administrator or the Administrator's agent on demand, or shall knowingly or willingly make any false statement in regard to the same. A person failing to comply with this subsection is guilty of a Class 1 misdemeanor. (1991, c. 680, s. 1; 1993, c. 539, ss. 435, 436; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsections (c) and (d).

§ 54C-60.1. Confidential records.

(a) As used in this section:

(1) "Compliance review committee" means:

a. An audit, loan review, or compliance committee appointed by the board of directors of a savings bank or any other person to the extent the person acts at the direction of or reports to a compliance review committee; and

b. Whose functions are to audit, evaluate, report, or determine compliance with any of the following:

1. Loan underwriting standards;
2. Asset quality;
3. Financial reporting to federal or State regulatory agencies;
4. Adherence to the savings bank's investment, lending, accounting, ethical, and financial standards; or
5. Compliance with federal or State statutory requirements.

(2) "Compliance review documents" means documents prepared for or created by a compliance review committee.

(3) "Loan review committee" means a person or group of persons who, on behalf of a savings bank, reviews assets, including loans held by the savings bank, for the purpose of assessing the credit quality of the loans or the loan application process, compliance with the savings bank's investment and loan policies, and compliance with applicable laws and regulations.

(4) "Person" means an individual, group of individuals, board, committee, partnership, firm, association, corporation, or other entity.

(b) Savings banks chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State savings bank regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of a savings bank or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against a savings bank, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence. (1995, c. 408, s. 3.)

Editor's Note. — Session Laws 1995, c. 408, s. 4, made this section effective upon ratification. The Act was ratified July 10, 1995.

§ 54C-62. Statement filed by savings bank; fees.

A State savings bank shall file in the office of the Administrator, on or before the first day of February in each year, in the form prescribed by the Administrator, a statement of the business standing and financial condition of the savings bank on the preceding 31st day of December, signed and sworn to by the secretary or other officer duly authorized by the board of directors of the savings bank before a notary public. The statement shall be accompanied by a filing fee set by the Administrator, subject to the advice and consent of the Commission. The filing fees shall be used to defray the expenses incurred by the Division in supervising State savings banks. (1991, c. 680, s. 1; 1993, c. 163, s. 3.)

§ 54C-63. Statement examined, approved, and published.

It is the duty of the Administrator to receive and thoroughly examine each annual statement required by G.S. 54C-62, and if made in compliance with the requirements thereof, each State savings bank shall at its own expense, publish an abstract of the same in a newspaper having general circulation within each market area of the savings bank as selected by the managing officer. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 9; 1993, c. 163, s. 4.)

§ 54C-64. Prohibited practices.

A person who engages in any of the following acts or practices is guilty of a Class 1 misdemeanor:

(1) Defamation: Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of any oral, written, or printed statement that is false regarding the financial condition of any savings bank.

(2) False information and advertising: Making, publishing, disseminating, circulating, or otherwise placing before the public in any publication, media, notice, pamphlet, letter, poster, or any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the savings bank business or with respect to any person in the conduct of the savings bank business that is untrue, deceptive, or misleading.

(3) Misleading advertising: Use of a name or designation by a savings bank in advertisements, announcements, or statements concerning the savings bank that does not include the words "savings bank" and the designation "SSB" in type that is equally prominent with the other terms in the name or designation of the savings bank. (1991, c. 680, s. 1; 1993, c. 539, s. 437; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 22.)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act [October 1, 1994] are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the introductory language.

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, deleted "and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court" in the introductory language.

ARTICLE 5.

Enforcement.

§ 54C-78. Civil penalties; directors, officers, and employees.

(a) A person, whether a director, officer, or employee, who is found to have violated this Article, whether willfully or as a result of gross negligence, gross incompetency, or recklessness, may be ordered to pay a civil penalty of up to five thousand dollars ($5,000) per violation. A person who is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article, may be ordered to pay a civil penalty of up to five thousand dollars ($5,000) per violation for each day that the violation or failure to comply continues. All civil penalties, plus interest and cost, that are collected under this subsection shall be deposited into the General Fund of the State treasury.

(b) To enforce this section, the Administrator may assess the penalty, appear in a court of competent jurisdiction, and move the court to order payment of the penalty. Before the assessment of the penalty, the Administrator shall hold a hearing, which shall comply with Article 3A of Chapter 150B of the General Statutes.

(c) Whenever the Administrator determines that an emergency exists that requires immediate corrective action, the Administrator, either before or after instituting any other action or proceeding authorized by this Article, may request the Attorney General to institute a civil action in a court of competent jurisdiction, in the name of the State upon the relation of the Administrator seeking injunctive relief to restrain or enjoin the violation or threatened violation of this Article and for any other and further relief as the court may deem proper. Instituting an action for injunctive relief shall not relieve any party to the proceedings from any civil or criminal penalty prescribed for violation of this Article.

(d) Nothing in this section shall prevent anyone damaged by a director, officer, or employee of a State savings bank from bringing a separate cause of action in a court of competent jurisdiction. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 10.)

§ 54C-79. Criminal penalties.

(a) This section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness, or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following are deemed to be Class 1 misdemeanors:

(1) The willful or knowing violation of this Article by any employee of the Division.

(2) The willful or knowing violation of a cease and desist order that has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false is deemed to be a Class 1 misdemeanor. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Administrator may enforce this section in a court of competent jurisdiction. (1991, c. 680, s. 1; 1993, c. 539, s. 438; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanors" for "misdemeanors and are punishable as provided in Chapter 14 of the General Statutes" in subsection (b) and "Class 1 misdemeanor" for "misdemeanor and is punishable as provided in Chapter 14 of the General Statutes" in subsection (c).

ARTICLE 6.

Corporate Administration.

§ 54C-105. Voting rights.

Voting rights in the affairs of a State savings bank may be exercised by members and stockholders by voting either in person or by proxy. (1991, c. 680, s. 1.)

Editor's Note. — This section has been set out above to correct an omission in the text of this section as it appears in the main volume.

ARTICLE 8.

Operations.

§ 54C-170. Minors as deposit account holders.

(a) A savings bank may issue a deposit account to a minor as the sole and absolute owner, or as a joint owner, and receive payments, pay withdrawals, accept pledges and act in any other manner with respect to the account on the order of the minor with like effect as if the minor were of full age and legal capacity. Any payment to a minor is a discharge of the savings bank to the extent thereof. The account shall be held for the exclusive right and benefit of the minor, and any joint owners, free from the control of all persons, except creditors.

(b) A savings bank may lease a safe deposit box to a minor and, with respect to the lease, may deal with the minor in all regards as if the minor were of full age and legal capacity. A minor entering a lease agreement with a savings bank under this subsection is bound by the terms of the agreement to the same extent as if the minor were of full age and legal capacity. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 11.)

§ 54C-179. Forced retirement of deposit accounts.

(a) A savings bank may, at any time that funds are on hand and available for this purpose, force the retirement of and redeem all or any portion of its deposit accounts that have not been pledged as security for loans. A savings bank may not redeem any fixed term deposit accounts that have not matured. The board of directors of the savings bank shall determine the number of and total amount of the deposit accounts to be retired.

(b) A savings bank shall give at least 30 days' notice by certified mail to the last address of each holder of an affected deposit account. The redemption price of deposit accounts so retired is the full withdrawal value of the account, as determined on the last interest date, plus all interest on deposit accounts credited or paid as of the effective retirement date. Interest continues to accrue and be paid or credited by the savings bank to the deposit accounts to be retired through the effective retirement date.

(c) Interest on the deposit accounts called for forced retirement ceases to accrue after the effective retirement date, if the required notice has been given properly, and if on the retirement date the funds necessary for payment have been set aside so as to be available. All rights with respect to those deposit accounts terminate after the effective retirement date, except for the right of the holder of the retired deposit account to receive the full redemption price.

(d) A savings bank shall not redeem deposit accounts by forced retirement whenever it has on file applications for withdrawal or maturities that have not yet been acted upon and paid. (1991 (Reg. Sess., 1992), c. 829, s. 12.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 829, s. 13 made this section effective upon ratification. The act was ratified July 2, 1992.

§§ 54C-180 through 54C-194: Reserved for future codification purposes.

ARTICLE 9.

Holding Companies.

§§ 54C-197, 54C-198: Reserved for future codification purposes.

Article 10.

Savings Bank Interstate Branches.

§ 54C-199. Title.

This Article shall be known and may be cited as the North Carolina Savings Bank Interstate Branch Act. (1993, c. 191, s. 3.)

Editor's Note. — Session Laws 1993, c. 191, s. 4 made this Article effective October 1, 1993.

§ 54C-200. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Administrator" means the Administrator of the Savings Institution Division.

(2) "Branch" means a full service office of a savings bank through which it renders a savings bank service other than its principal office. A savings bank may engage in any authorized function or service through an authorized branch office.

(3) "Commission" means the North Carolina Savings Institution Commission.

(4) "Home state" means (i) as to a state-chartered savings bank, the state which granted the savings bank its charter, and (ii) as to a federal savings bank, the state in which the savings bank has its principal office.

(5) "Out-of-state" savings bank means a savings bank granted a charter by any state other than this State and whose principal office is not located in this State.

(6) "Savings bank" means a state savings bank or a federal savings bank, unless limited by use of the words "State" or "federal".

(7) "State savings bank" means a depository institution chartered under the laws of this State.

(8) "Supervisor" means the state savings bank supervisor or equivalent state official having primary regulatory authority over an out-of-state savings bank. (1993, c. 191, s. 3.)

§ 54C-201. Establishment of branches by out-of-state savings banks.

Any out-of-state savings bank that meets the requirements of this Article may establish a branch within North Carolina either by (i) *de novo* entry; (ii) the purchase of an existing branch; (iii) the purchase of all or substantially all of the assets of a State savings bank located in North Carolina; or (iv) merger or consolidation. (1993, c. 191, s. 3.)

§ 54C-202. Application requirements.

(a) Any out-of-state savings bank desiring to establish a branch office under this Article shall file with the Administrator a written application meeting the following requirements:

(1) The out-of-state savings bank shall agree to comply with all the applicable rules and regulations, and informational filing requirements contained in the laws and rules of this State that would apply to a State savings bank engaging in an equivalent form of transaction. Additionally, the Administrator shall apply the same standards of approval to the application of the out-of-state savings bank as would apply to an application by a State savings bank for an equivalent form of transaction.

(2) The out-of-state savings bank shall provide the Administrator, in the manner prescribed by the Administrator, with such additional information as the Administrator deems necessary, to fully evaluate the application.

(3) The out-of-state savings bank shall pay an application fee established by the Administrator pursuant to G.S. 54C-9.

(4) The out-of-state savings bank shall not commence operations of the branch office until it has received the written approval of the Administrator.

(b) The Administrator shall act on the application within 90 days of receipt of the completed application. (1993, c. 191, s. 3.)

§ 54C-203. Conditions for approval.

No application by an out-of-state savings bank received under this Article may be finally approved by the Administrator unless:

(1) The Administrator has received in writing approval of the proposed transaction from the supervisor of the out-of-state savings bank;

(2) The supervisor of the out-of-state savings bank agrees in writing to share with the Administrator examination reports prepared by the supervisor and any other information deemed necessary by the Administrator regarding the out-of-state savings bank;

(3) The out-of-state savings bank agrees in writing to make available to the Administrator all information that may be required to effectively examine the savings bank;

(4) The out-of-state savings bank agrees in writing that so long as it maintains a branch in North Carolina, it will meet the conditions set forth in this Article and comply with all applicable North Carolina laws and any rules issued thereunder, as well as any orders or directives issued to the savings bank by the Administrator;

(5) The home state of the out-of-state savings bank permits savings banks chartered under the laws of this State to establish branches within its border; and

(6) The out-of-state savings bank designates and files with the Office of the Secretary of State a document appointing an agent in this State to receive service of judicial process. (1993, c. 191, s. 3.)

§ 54C-204. Special conditions.

(a) The Administrator may require an out-of-state savings bank to designate one of its branches in North Carolina as a "headquarters branch" and may, by rule, require that reports, books, and records required of savings banks doing business under this Article be available at the designated headquarters branch.

(b) Once an out-of-state savings bank has established at least one branch in North Carolina pursuant to this Article, subsequent applications to establish additional branches shall be considered on the same basis as an application of a State savings bank to establish an additional branch pursuant to G.S. 54C-23.

(c) If an out-of-state savings bank establishes a branch or branches by merger with or purchase from a savings bank located in this State, and the out-of-state savings bank and the savings bank located in this State are both owned by the same holding company, any conditions, limitations, or restrictions placed on the holding company, pursuant to Article 9 of this Chapter, shall continue to apply to both the acquiring out-of-state savings bank and its holding company. (1993, c. 191, s. 3.)

§ 54C-205. Powers.

An out-of-state savings bank that establishes a branch in North Carolina may engage in all the activities authorized by North Carolina law for a State savings bank except to the extent that such activities have been expressly prohibited by the state supervisor of the out-of-state savings bank or the laws of the out-of-state savings bank's home state. (1993, c. 191, s. 3.)

§ 54C-206. Establishment of out-of-state branches by State savings banks.

With the prior consent of the Administrator, any savings bank chartered under the laws of North Carolina may establish a branch in any other state in accordance with the laws of such other state. (1993, c. 191, s. 3.)

§ 54C-207. Regulatory and supervisory oversight.

(a) The Administrator may enter into such agreements as necessary regarding the scope, timing, coordination, and frequency of examinations and other supervisory matters, including the sharing of information gathered in such examinations, with other supervisors and federal savings bank regulators. This authority applies to both out-of-state savings banks and their holding companies.

(b) The Administrator may require periodic reports on the financial condition of any out-of-state savings bank or its holding company that maintains a branch within North Carolina and may from time to time require from any such out-of-state savings banks other reports under oath in such scope and detail as the Administrator may reasonably determine to be necessary for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Administrator may, if necessary, conduct full-scope, on-site examinations of any branch established pursuant to this Article.

(d) Out-of-state savings banks shall be assessed and required to pay supervisory and examination fees in accordance with G.S. 54C-55 and the rules issued thereunder. (1993, c. 191, s. 3.)

§ 54C-208. Enforcement.

(a) Any enforcement authority available to the Administrator for use against a State savings bank may, subject to the provisions of

Chapter 150B of the General Statutes, be used against a branch established under this Article and against the out-of-state savings bank or its parent holding company establishing such branch.

(b) The Administrator may suspend or revoke the authority of an out-of-state savings bank to establish or maintain a branch in North Carolina upon a finding of fact or condition or circumstance that is grounds for denial of an application to establish and maintain a branch under this Article.

(c) The Administrator may enforce the provisions of this Article through an action in any court of North Carolina or any other state or any court of the United States as provided in G.S. 54C-76, 54C-77, 54C-78, and 54C-79 for the purpose of obtaining an appropriate remedy for violation of any provisions of this Article.

(d) The Administrator may enter into joint actions with other supervisors or federal savings banking regulators, or both, having concurrent jurisdiction over any out-of-state savings bank that has a branch in North Carolina or over any State savings bank that has a branch in another state, or may take such action independently to carry out the Administrator's responsibilities under this Article and assure compliance with the provisions of this Article and the applicable savings banking laws of this State. (1993, c. 191, s. 3.)

§ 54C-209. Branch closings.

An out-of-state savings bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any State savings bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch, and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1993, c. 191, s. 3.)

§ 54C-210. Rules.

The Commission may adopt rules as necessary to carry out the provisions of this Article. (1993, c. 191, s. 3.)

§ 54C-211. Appeal of Administrator's decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Administrator, appeal such decision to the Commission. The Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Administrator's decision. Failure of the Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Commission approving the decision of the Administrator. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 54C-16. (1993, c. 191, s. 3.)

§ 54C-212. Severability.

If any provision of this Article or the application of such provision to any persons or circumstances is found invalid, the remainder of this Article and its application to persons or circumstances other than those as to which it is held invalid, shall not be affected. (1993, c. 191, s. 3.)

Chapter 55.

North Carolina Business Corporation Act.

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55-17-05. Curative statute.

Editor's Note. — The amendments to the North Carolina Comments set out in this Supplement reflect either errors discovered in the comments as originally drafted or technical amendments enacted in 1990 to the new North Carolina Business Corporation Act.

ARTICLE 1.

General Provisions.

Part 1. Short Title and Reservation of Power.

§ 55-1-01. Short title.

Editor's Note. —

Session Laws 1989, c. 265, s. 3, which is noted under this section in the main volume, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 32(a), made this Chapter effective July 1, 1990, except for § 55-16-22, which became effective January 1, 1991.

Legal Periodicals. —

For article, "The Uncertain Case Against the Double Taxation of Corporate Income," see 68 N.C.L. Rev. (1990).

For business symposium, "Management Buyouts: Strategies, Ethics and Other Considerations," see 25 Wake Forest Law Rev. 1 (1990).

For article discussing changes in theories of the corporation over the last 150 years, see "Theories of the Corporation," 1990 Duke L.J. 201.

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "Discrimination, Managerial Discretion and the Corporate Contract," see 26 Wake Forest L. Rev. 541 (1991).

Part 2. Filing Documents.

§ 55-1-20. Filing requirements.

(a) To be entitled to filing by the Secretary of State under this Chapter, a document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements.

(b) The document must be one that is required or permitted by this Chapter to be filed in the office of the Secretary of State.

(c) The document must contain the information required by this Chapter. It may contain other information as well.

(d) The document must be typewritten or printed.

(e) The document must be in the English language.

A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(f) The document must be executed:

(1) By the chairman of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(g) The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs. The document may but need not contain:

(1) The corporate seal;

(2) An attestation by the secretary or an assistant secretary; and

(3) An acknowledgement, verification, or proof.

(h) If the Secretary of State has prescribed a mandatory form for the document under G.S. 55-1-21, the document must be in or on the prescribed form.

(i) The document must be delivered to the office of the Secretary of State for filing and must be accompanied by one exact or conformed copy (except as provided in G.S. 55-5-03 and G.S. 55-15-09), and all fees required by this Chapter.

(j) Any signature on any document authorized to be filed with the Secretary of State under any provision of this Chapter may be a facsimile. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.1(a); 1991, c. 645, s. 15.)

§ 55-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him for filing:

	Document	Fee
(1)	Articles of incorporation	$100.00
(2)	Application for reserved name	10.00
(3)	Notice of transfer of reserved name	10.00
(4)	Application for registered name	10.00
(5)	Application for renewal of registered name	10.00
(6)	Corporation's statement of change of registered agent or registered office or both	5.00
(7)	Agent's statement of change of registered office for each affected corporation	5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	5.00
(10)	Amendment of articles of incorporation	50.00
(11)	Restated articles of incorporation	10.00
	with amendment of articles	50.00
(12)	Articles of merger or share exchange	50.00
(13)	Articles of dissolution	30.00
(14)	Articles of revocation of dissolution	10.00
(15)	Certificate of administrative dissolution	No fee

Document	Fee
(16) Application for reinstatement following administrative dissolution	25.00
(17) Certificate of reinstatement	No fee
(18) Certificate of judicial dissolution	No fee
(19) Application for certificate of authority	200.00
(20) Application for amended certificate of authority	50.00
(21) Application for certificate of withdrawal	10.00
(22) Certificate of revocation of authority to transact business	No fee
(23) Annual report	10.00
(24) Articles of correction	10.00
(25) Application for certificate of existence or authorization	5.00
(26) Any other document required or permitted to be filed by this Chapter	10.00.

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on him under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original; and

(2) Five dollars ($5.00) for the certificate. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 42, 43, 45; c. 797, ss. 4, 5; 1975, 2nd Sess., c. 981, s. 1; 1983, c. 713, ss. 32-38; 1989, c. 265, s. 1; c. 714; 1989 (Reg. Sess., 1990), c. 1057; 1991, c. 574, s. 1.)

§ 55-1-22.1. Expedited filings.

The Secretary of State shall guarantee the expedited filing of a document upon receipt of the document in proper form and the payment of the required filing fee. The Secretary of State may collect the following additional fees for the expedited filing of a document received in good form:

(1) Two hundred dollars ($200.00) for the filing by the end of the same business day of a document received by 12:00 noon Eastern Standard Time; and

(2) One hundred dollars ($100.00) for the filing of a document within 24 hours after receipt, excluding weekends and holidays.

The Secretary of State shall not collect the fees allowed in this section unless the person submitting the document for filing requests an expedited filing and is informed by the Secretary of State of the fees prior to the filing of the document. (1995, c. 539, s. 1.)

Editor's Note. — Session Laws 1995, c. 539, s. 38(c) made this section applicable to expedited filings submitted on or after July 29, 1995.

§ 55-1-23. Effective time and date of document.

(a) Except as provided in subsection (b) and G.S. 55-1-24(c), a document accepted for filing is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original document; or

(2) At the time specified in the document as its effective time on the date it is filed.

(b) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at 11:59:59 P.M. on that date. A delayed effective date for a document may not be later than the 90th day after the date it is filed.

(c) Except as provided in G.S. 55-2-03(b), the fact that a document has become effective under this section does not determine its validity or invalidity or the correctness or incorrectness of the information contained in the document. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1993, c. 552, s. 1.)

§ 55-1-25. Filing duty of Secretary of State.

(a) If a document delivered to the office of the Secretary of State for filing satisfies the requirements of this Chapter, the Secretary of State shall file it. Documents filed with the Secretary of State pursuant to this Chapter may be maintained by the Secretary either in their original form or in photographic, microfilm, optical disk media, or other reproduced form. The Secretary may make reproductions of documents filed under this Chapter, or under any predecessor act, by photographic, microfilm, optical disk media, or other means of reproduction, and may destroy the originals of those documents reproduced.

(b) The Secretary of State files a document by stamping or otherwise endorsing "Filed", together with the Secretary's name and official title and the date and time of filing, on both the original and the document copy. After filing a document, except as provided in G.S. 55-5-03 and G.S. 55-15-09, the Secretary of State shall deliver the document copy to the domestic or foreign corporation or its representative.

(c) If the Secretary of State refuses to file a document, the Secretary shall return it, by personal delivery or by first- class mail postage prepaid, to the domestic or foreign corporation or its representative within five days after the document was received, together with a brief, written statement of the date and the reason for refusal. The Secretary of State may correct apparent errors and omissions on a document submitted for filing if authorized to make the corrections by the person submitting the document for filing. The authorization to make the corrections shall be confirmed, according to procedures adopted by rule, by the Secretary prior to making the correction.

(d) The Secretary of State's duty is to review and file documents that satisfy the requirements of this Chapter. The Secretary of State's filing or refusing to file a document does not:

(1) Except as provided in G.S. 55-2-03(b), affect the validity or invalidity of the document in whole or part;

(2) Relate to the correctness or incorrectness of information contained in the document;

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.2; 1993, c. 552, s. 2; 1995, c. 539, s. 2.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, added the second and third sentences in subsections (a) and (c); substituted "the secretary's" for "his" in subsections (b) and (d); and substituted "the Secretary" for "he" in subsection (c).

§ 55-1-26. Appeal from Secretary of State's refusal to file document.

(a) If the Secretary of State refuses to file a document delivered to his office for filing, the person tendering the document for filing may, within 30 days after such refusal, appeal the refusal to the Superior Court of Wake County. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to compel the Secretary of State to file the document. The petition shall have attached to it the document to be filed and the Secretary of State's explanation for his refusal to file. The appeal to the superior court is not governed by the Administrative Procedure Act and shall be determined upon such further notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances.

(b) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.3.)

AMENDED NORTH CAROLINA COMMENTARY

The prior law contained no explicit procedure for appeal from the Secretary of State's refusal to file a document.

This section varies from the Model Act in that it avoids use of the word "summarily" and instead sets out a specific procedure, in the nature of a petition for a writ of mandamus, which (1) requires the appellant to file a copy of its petition with the Secretary of State, (2) makes it clear that the Administrative Procedure Act does not govern such appeal, and (3) provides that the court may give the Secretary of State further notice and an opportunity to be heard if it chooses to do so. In addition, to clarify that a refusal to file initial articles of incorporation or reservations of corporate names may be appealed pursuant to this section, this section uses the words "person tendering the document for filing" to describe the appellant where the Model Act uses the words "domestic or foreign corporation."

§ 55-1-27. Evidentiary effect of copy of filed document.

A certificate attached to a copy of a document filed by the Secretary of State, bearing the Secretary of State's signature (which may be in facsimile) and the seal of office and certifying that the copy is a true copy of the document, is conclusive evidence that the original document is on file with the Secretary of State. A photographic, microfilm, optical disk media, or other reproduced copy of a document filed pursuant to this Chapter or any predecessor act, when certified by the Secretary, shall be considered an original for all purposes and is admissible in evidence in like manner as an original. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1995, c. 539, s. 3.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "the Secretary of State's" for "his" in the first sentence, added the last sentence, and made stylistic changes.

§ 55-1-28. Certificate of existence.

(a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this State;

(2) That (i) the domestic corporation is duly incorporated under the law of this State, the date of its incorporation, and the period of its duration if less than perpetual; or (ii) that the foreign corporation is authorized to transact business in this State;

(3) That the articles of incorporation of a domestic corporation or the certificate of authority of a foreign corporation has not been suspended for failure to comply with the Revenue Act of this State and that the corporation has not been administratively dissolved for failure to comply with the provisions of this Chapter;

(4) That its most recent annual report required by G.S. 55-16-22 has been delivered to the Secretary of State;

(5) That articles of dissolution have not been filed; and

(6) Other facts of record in the office of the Secretary of State that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, s. 1.)

§ 55-1-29. Penalty for signing false document.

(a) A person commits an offense if he signs a document he knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing.

(b) An offense under this section is a Class 1 misdemeanor. (1989, c. 265, s. 1; 1993, c. 539, s. 439; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

Part 3. Secretary of State.

§ 55-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

(a) The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter shall constitute grounds for administrative dissolution under G.S. 55-14-20 or for revocation under G.S. 55-15-30, as the case may be.

(b) Each officer and director of a domestic or foreign corporation who knowingly fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 539, s. 440; c. 552, s. 3; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 1993, c. 539, s. 440, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

Part 4. Definitions.

§ 55-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporation" or "domestic corporation" means a corporation for profit or a corporation having capital stock that is incorporated under or subject to the provisions of this Chapter and that is not a foreign corporation except that in G.S. 55-9-01 and G.S. 55-15-21 "corporation" includes domestic and foreign corporations.

(5) "Deliver" includes mail.

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its

shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(6a) "Dividend credit" as used in G.S. 55-6-01(d)(5) means the aggregate of all yearly dividend credits. "Yearly dividend credit" means with respect to noncumulative preferred shares, the amount by which the full dividend preference of such a share, to the extent that such preference is earned by the corporation with respect to such a share in a particular fiscal year, exceeds the dividends paid on said share for that year; provided, that no dividend credit shall accrue unless, and only to the extent that, there exists an earned surplus at the end of such fiscal year. Computations of earnings allocable to classes of shares made in good faith by the board of directors in accordance with generally accepted accounting principles shall be conclusive. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.

(7) "Effective date of notice" is defined in G.S. 55-1-41.

(8) Reserved for future codification purposes.

(9) "Entity" includes (without limiting the meaning of such term in Article 9) corporation and foreign corporation; nonprofit corporation; professional corporation; profit and nonprofit unincorporated association; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States, and foreign government.

(10) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of this State.

(11) "Governmental subdivision" includes authority, county, district, and municipality.

(12) "Includes" means a partial definition.

(13) "Individual" denotes a natural person legally competent to act and also includes the estate of an incompetent or deceased individual.

(13a) An item is "mailed" when it is deposited in the United States mail with postage thereon prepaid and correctly addressed. When a corporation mails an item to a shareholder, "correctly addressed" means addressed to the shareholder's address as shown in the corporation's current record of shareholders.

(14) "Means" denotes an exhaustive definition.

(14a) "Merger" as used in Article 9 includes a "share exchange" as used in Article 11.

(15) "Notice" includes demand and is defined in G.S. 55-1-41.

(16) "Person" includes individual and entity.

(17) "Principal office" means the office (in or out of this State) so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

(18) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(18a) "Public corporation" means any corporation that has a class of shares registered under Section 12 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78*l*).

(19) "Record date" means the date established under Article 6 or 7 on which a corporation determines the identity of its shareholders for purposes of this Chapter.

(20) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under G.S. 55-8-40(c) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(21) "Shares" means the units into which the proprietary interests in a corporation are divided.

(22) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(23) "State", when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(24) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(25) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(26) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this Chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this Chapter to vote generally on the matter are for that purpose a single voting group. (1955, c. 1371, s. 1; 1959, c. 1316, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.4; 1993, c. 552, s. 4.)

AMENDED NORTH CAROLINA COMMENTARY

This section defines more terms than were defined in former G.S. 55-2 and in some cases the definitions are different. The following differences should be noted:

(i) For the sake of uniformity with other states, this Act does not use the term "charter," but instead defines "articles of incorporation" to include all amendments.

(ii) This section does not contain general definitions of the terms "assets," "dominant shareholder," "liabilities," "net assets," or "preferred share," as did prior law, because such terms have no special significance in the Model Act.

This section differs from the Model Act in certain respects:

(i) The phrase "unless otherwise specifically provided" was added to the introduction to allow for different definitions in Article 9.

(ii) Except for the final clause thereof, the definition of "corporation" was brought forward with minor modifications from prior law. The final clause, relating to the use of the term "corporation" in G.S. 55-9-01, was considered necessary because that section, which was brought forward from prior law, uses the term "corporation" in certain cases to refer to any corporation, foreign or domestic. In the remainder of Article 9, the term "corporation" refers to domestic corporations only.

(iii) The definition of "dividend credit" was brought forward with minor modifications from prior law.

(iv) The Model Act's definition of "employee" was deleted as unnecessary and undesirable.

(v) The Model Act's definition of "entity" was expanded to include professional corporations.

(vi) "Means" was substituted for "denotes" in the definition of "includes."

(vii) The definition of "individual" was expanded.

(viii) Definitions were included for "mail" and "merger" to clarify possible confusion in the use of those terms.

(ix) "Notice" was defined to include "demand."

(x) A definition of "public corporation" was added for ease of reference in those provisions of the Act that are applicable only to corporations having a class of shares registered under the Securities Exchange Act of 1934.

The Model Act uses the term "not-for-profit corporation" rather than the term "nonprofit corporation," which is used in this Act. The terms "not-for-profit corporation" and "nonprofit corporation" are interchangeable in Chapter 55A. "Nonprofit corporation" and "nonprofit association" were therefore used throughout this Act.

CASE NOTES

Quoted in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992).

§ 55-1-41. Notice.

(a) Notice under this Chapter shall be in writing unless oral notice is authorized in the corporation's articles of incorporation or bylaws and written notice is not specifically required by this Chapter.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication, or by facsimile transmission; or by mail or private carrier. If these forms of personal notice are impracticable as to one or more persons, notice may be communicated to such persons by publishing notice in a newspaper in the county wherein the corporation has its principal place of business in the State, or if it has no principal place of business in the State, the county wherein it has its registered office; or by radio, television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its shareholder is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.

(d) Written notice to a domestic or foreign corporation (authorized to transact business in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report on file in the office of the Secretary of State or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(e) Except as provided in subsection (c), written notice is effective at the earliest of the following:

(1) When received;

(2) Five days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;

(3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(f) Oral notice is effective when actually communicated to the person entitled thereto.

(g) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern. (1989, c. 265, s. 1; 1993, c. 552, s. 5.)

CASE NOTES

Cited in Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993).

ARTICLE 2.

Incorporation.

§ 55-2-02. Articles of incorporation.

(a) The articles of incorporation must set forth:

(1) A corporate name for the corporation that satisfies the requirements of G.S. 55-4-01;

(2) The number of shares the corporation is authorized to issue and any other information required by G.S. 55-6-01;

(3) The street address, and the mailing address if different from the street address, of the corporation's initial registered office, the county in which the initial registered office is located, and the name of the corporation's initial registered agent at that address; and

(4) The name and address of each incorporator.

(b) The articles of incorporation may set forth any provision that under this Chapter is required or permitted to be set forth in the bylaws, and may also set forth:

(1) The names and addresses of the individuals who are to serve as the initial directors;

(2) Provisions not inconsistent with law regarding (i) the purpose or purposes for which the corporation is organized; (ii) managing the business and regulating the affairs of the corporation; (iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders; (iv) a par value for authorized shares or classes of shares; (v) the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; (vi) any limitation on the duration of the corporation; and

(3) A provision limiting or eliminating the personal liability of any director arising out of an action whether by or in the right of the corporation or otherwise for monetary damages for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55-8-33, (iii) any transaction from which the director derived an improper personal benefit, or (iv) acts or omissions occurring prior to the date the provisions became effective. As used herein, the term "improper personal benefit" does not include a director's

reasonable compensation or other reasonable incidental benefit for or on account of his service as a director, officer, employee, independent contractor, attorney, or consultant of the corporation. A provision permitted by this Chapter in the articles of incorporation, bylaws, or a contract or resolution indemnifying or agreeing to indemnify a director against personal liability shall be fully effective whether or not there is a provision in the articles of incorporation limiting or eliminating personal liability.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this Chapter. (Code, s. 677; 1885, c. 19; 1889, c. 170; 1891, c. 257; 1893, c. 244; 1901, c. 2, s. 8; c. 47; 1903, c. 453; Rev., s. 1137; 1911, c. 213, s. 1; 1913, c. 5, s. 1; C.S., s. 1114; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1957, c. 979, s. 5; 1959, c. 1316, s. 1½; 1969, c. 751, s. 2; 1973, c. 469, s. 2; 1987, c. 626, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 6.)

Legal Periodicals. — For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

§ 55-2-03. Incorporation.

CASE NOTES

Stated in Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co., 110 N.C. App. 592, 430 S.E.2d 437 (1993).

ARTICLE 3.

Purposes and Powers.

§ 55-3-02. General powers.

(a) Unless its articles of incorporation or this Chapter provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this State, for managing the business and regulating the affairs of the corporation;

(4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(9) To be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(10) To conduct its business, locate offices, and exercise the powers granted by this act within or without this State;

(11) To elect or appoint directors, officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) To pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans, stock option plans, and other benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) To make donations for the public welfare or for charitable, religious, cultural, scientific, or educational purposes;

(14) To transact any lawful business that will aid governmental policy;

(15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation; and

(16) To provide insurance for its benefit on the life or physical or mental ability of any of its directors, officers or employees or on the life or physical or mental ability of any security holder for the purpose of acquiring at his death or disability its securities owned by such security holder, and for these purposes the corporation is deemed to have an insurable interest in its directors, officers, employees, or security holders; and to provide insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest.

(b) It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this section. (Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; Rev., s. 1128; 1909, c. 507, s. 1; C.S., s. 1126; 1925, cc. 235, 298; 1929, c. 269; 1939, c. 279; 1945, c. 775; G.S., s. 55-26; 1951, c. 1240, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 4, 5; 1969, c. 751, ss. 7, 8; 1989, c. 265, s. 1.)

Editor's Note. — The section above is set out to correct two typographical errors in subsection (a).

ARTICLE 4.

Name.

§ 55-4-01. Corporate name.

(a) A corporate name:

(1) Must contain the word "corporation", "incorporated", "company", or "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd."; and

(2) May not contain language stating or implying that the corporation is organized for a purpose other than that permitted by G.S. 55-3-01 and its articles of incorporation.

(b) Except as authorized by subsection (c) of this section, a corporate name must be distinguishable upon the records of the Secretary of State from:

(1) The corporate name of a corporation incorporated or authorized to transact business in this State;

(2) A corporate name reserved or registered under G.S. 55-4-02 or G.S. 55-4-03;

(3) The fictitious name adopted by a foreign corporation authorized to transact business in this State because its real name is unavailable;

(4) The corporate name of a nonprofit corporation incorporated or authorized to transact business in this State; and

(5) The name used, reserved, or registered by a limited liability company pursuant to Chapter 57C of the General Statutes or by a limited partnership pursuant to Chapter 59 of the General Statutes.

(c) A person may apply to the Secretary of State for authorization to use a name that is not distinguishable upon his records from one or more of the names described in subsection (b). The Secretary of State shall authorize use of the name applied for if:

(1) The other corporation consents to the use in writing and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applicant; or

(2) The applicant delivers to the Secretary of State a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) Reserved for future codification purposes.

(e) The use of assumed names or fictitious names, as provided for in Chapter 66, is not affected by this Chapter.

(f) Neither the reservation or registration of a corporate name nor the incorporation of any domestic corporation shall authorize the use in this State of a corporate name in violation of the rights of any third party under the federal trademark act, the trademark act of this State, or other statutory or common law, or be a defense to an action for violation of any such rights.

(g) The name of a corporation dissolved under Article 14 may not be used by another corporation until:

(1) In the case of a voluntary dissolution, the expiration of 120 days after the effective date of the dissolution, or

(2) In the case of an administrative dissolution, the expiration of the period within which the corporation may be reinstated pursuant to G.S. 55-14-21,

unless the dissolved corporation changes its name to a name that is distinguishable upon the records of the Secretary of State from the names of other business corporations, nonprofit corporations, limited partnerships, or limited liability companies organized or transacting business in this State. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.5; 1995, c. 539, ss. 4, 5.)

AMENDED NORTH CAROLINA COMMENTARY

Unlike the Model Act, former G.S. 55-12(a) did not permit a corporate name to contain "words or abbreviations of like import in another language." The drafters concluded that a corporate name should not contain foreign words or abbreviations to indicate corporateness and that it would be confusing to the Secretary of State's office to determine what foreign words or abbreviations are "of like import." Therefore, consistent with the provisions of the prior law, they omitted the Model Act language "or words or abbreviations of like import in another language" from subdivision (a)(1).

The Model Act was modified in subsection (c) to clarify that any person (not just a corporation) may apply for authorization under this subsection.

Subsection 4.01(d) of the Model Act is a restatement of the trade name law and therefore was deemed unnecessary.

Subsection (e) was rewritten for clarification.

Subsection (f) was added to bring forward the provisions of former G.S. 55-12(k).

Subsection (g), which is not in the Model Act, is an entirely new section that addresses the use of a dissolved corporation's name.

Former G.S. 55-12(b), which provided that a corporate name could not contain "any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter," was not brought forward. The provision was aimed at preventing fraudulent business practices, and the drafters decided that this should be policed by the Attorney General rather than by the Secretary of State through the corporation laws.

Effect of Amendments. — Session Laws 1995, c. 539, ss. 4 and 5, applicable to names filed, reserved, or registered on or after the date of ratification (July 29, 1995), inserted "of this section" following "subsection (c)" in the introductory language of subsection (b), and added subdivision (b)(5) and made related changes; and in subsection (g) deleted "the expiration of two years after the effective date of the dissolution unless the dissolved corporation consents in writing to the use" from the end of the introductory langauge, added subdivisions (g)(1) and (g)(2), and added the last paragraph.

§ 55-4-04. Reserved and registered names, powers of the Secretary of State.

The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing not less than 15 days after the effective date of written notice given by registered or certified mail, return receipt requested, to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3; 1989, c. 265, s. 1; 1993, c. 552, s. 7.)

§ 55-4-05. Real property records.

(a) Whenever the name of any domestic or foreign corporation holding title to real property in this State is changed upon amendment to the articles of incorporation or whenever title to real property in this State is transferred by operation of law upon merger of two or more corporations, a certificate reciting such change or transfer shall be recorded in the office of the register of deeds of the county where the property lies, or if the property is located in more than one county, then in each county where any portion of the property lies.

(b) The Secretary of State shall adopt uniform certificates to be furnished for registration in accordance with this section. In the case of a foreign corporation, a similar certificate by any competent authority of the jurisdiction of incorporation may be registered in accordance with this section.

(c) The certificate required by this section shall be recorded by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by any other officer shall be required. The former name of the corporation holding title to the real property before the amendment or merger shall appear in the "Grantor" index, and the amended name of the corporation holding title to the real property by virtue of the amendment or merger shall appear in the "Grantee" index. (1989, c. 265, s. 1; 1991, c. 645, s. 2(a).)

ARTICLE 5.

Office and Agent.

§ 55-5-02. Change of registered office or registered agent.

(a) A corporation may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

(1) The name of the corporation;

(2) The street address, and the mailing address if different from the street address, of the corporation's current registered office, and the county in which it is located;

(3) If the address of the corporation's registered office is to be changed, the street address, and the mailing address if different from the street address, of the new registered office, and the county in which it is located;

(4) The name of its current registered agent;

(5) If the current registered agent is to be changed, the name of the new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) That after the change or changes are made, the addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the address of his business office, he may change the address of the registered office of any corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

(c) A corporation may change its registered office or registered agent by including in its annual report required by G.S. 55-16-22 the information and any written consent required by subsection (a). (1901, c. 2, s. 31; Rev., s. 1176; C.S., s. 1133; G.S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3; 1989, c. 265, s. 1; 1991, c. 645, s. 3.)

§ 55-5-03. Resignation of registered agent.

(a) A registered agent may resign his agency appointment by signing and filing with the Secretary of State the signed original and two exact or conformed copies of a statement of resignation which may include a statement that the registered office is also discontinued. The statement must include or be accompanied by a certification from the registered agent that he has mailed or delivered to the corporation at its last known address written notice of this resignation. Such certification shall include the name and title of the officer notified, if any, and the address to which the notice was mailed or delivered.

(b) After filing the statement the Secretary of State shall mail one copy to the registered office (if not discontinued) and the other copy to the corporation at its principal office shown in its most recent annual report.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed. (1901, c. 2, s. 31; Rev., s. 1176; C.S., s. 1133; G.S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.6.)

AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to require that the statement of resignation include or be accompanied by a certification that written notice of the resignation was mailed or delivered to the corporation. The certification must include the name and title of the officer notified (if any) and the address to which the notice of resignation was mailed or delivered.

§ 55-5-04. Service on corporation.

CASE NOTES

Violation of Due Process Where Attorney Had Actual Knowledge of Defendant's Address. — Where plaintiff's attorney had actual knowledge of an address where defendant could be served and did not attempt to serve defendant at the known address, substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights. Interior

Distribs., Inc. v. Hartland Constr. Co., 116 N.C. App. 627, 449 S.E.2d 193 (1994).

Corporation Bound upon Service of Agent. — Service of process upon a corporation's registered agent binds that corporation when the agent is served, not when the service actually comes to the attention of an officer or agent charged with defending actions against the corporation. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989), decided under the former Business Corporation Act.

Cited in Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

ARTICLE 6.

Shares and Distribution.

Part 1. Shares.

§ 55-6-01. Authorized shares.

Cross References. — As to rights of holders of debt securities, see § 55-7-21.1.

Part 2. Issuance of Shares.

§ 55-6-21. Issuance of shares.

(a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. The determination by the board of directors as to the adequacy of consideration is conclusive as to whether the shares are validly issued, fully paid, and nonassessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or for a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefit received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part. (1901, c. 2, ss. 19, 53, 54; 1903, c. 660, ss. 2, 3; Rev. ss. 1159, 1160, 1161; C.S., ss. 1157, 1158; G.S., ss. 55-62, 55-63; 1955, c. 1371, s. 1; 1957, s. 1039; 1959, c. 1316, ss. 10, 13, 14; 1969, c. 751, s. 20; 1973, c. 469, ss. 15, 45.2; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.7.)

§ 55-6-22. Liability of shareholders.

Legal Periodicals. —

For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

§ 55-6-23. Share dividends.

(a) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one or more classes or series. An issuance of shares under this subsection is a share dividend.

(b) Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless:

(1) The articles of incorporation so authorize,

(2) There are no outstanding shares of the class or series to be issued, or

(3) A majority of the votes entitled to be cast by the class or series to be issued approve the issuance of not more than a stated number of shares within a period of not more than one year after such approval.

(c) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 17, 18; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.8.)

§ 55-6-27. Restriction on transfer of shares and other securities.

(a) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section, it is not unconscionable under the circumstances, and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by G.S. 55-6-26(b). Unless so noted, a restriction is not enforceable except against a person who receives actual written notice of the restrictions.

(c) A restriction on the transfer or registration of transfer of shares is authorized:

(1) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;

(2) To preserve exemptions under federal or state securities law;

(3) For any other reasonable purpose.

(d) A restriction authorized by G.S. 55-6-27(c) may:

(1) Obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares;

(2) Obligate the corporation or other persons (separately, consecutively, or simultaneously) to acquire the restricted shares;

(3) Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable;

(4) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable;

(5) Contain any other provision reasonably related to an authorized purpose.

(e) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares. (1989, c. 265, s. 1.)

Editor's Note. — The section above is set out to correct a typographical error in the first sentence of subsection (a).

Part 3. Subsequent Acquisition of Shares by Shareholders and Corporation.

§ 55-6-30. Shareholders' preemptive rights.

(a) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation or subsection (d) of this section so provide.

(b) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights" (or words of similar import) means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them.

(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to (i) shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates; (ii) shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates; (iii) shares authorized in articles of incorporation that are issued within six months from the effective date of incorporation; (iv) shares issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business.

(4) Holders of a share of any class have no preemptive rights with respect to shares of any other class.

(5) Reserved for future codification purposes.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person during a period of one year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one year is subject to the shareholders' preemptive rights.

(c) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

(d) Notwithstanding the foregoing provision of this section, shareholders of a corporation incorporated before July 1, 1990, other than a public corporation, shall have a preemptive right to acquire the unissued shares of the corporation, to the extent provided in (and subject to the limitations of) subdivisions (b) (1)-(6) and subsection (c) of this section, except to the extent the articles of incorporation expressly provide otherwise. (1955, c. 1371, s. 1; 1969, c. 751, ss. 29-32; 1979, c. 508, s. 2; 1989, c. 265, s. 1; 1993, c. 552, s. 8.)

§ 55-6-31. Corporation's acquisition of its own shares.

CASE NOTES

Purpose of 1985 Amendment to Former § 55-52. — The 1985 amendment to former § 55-52 was established to enable corporations to enter into written agreements with shareholders at the outset of the relationship for the issuance of stock redeemable at the shareholder's option. The statute was not designed to simply allow the corporation to enter into a written agreement with a shareholder to redeem stock out of and as an impairment to stated capital, which stock was already being held by the shareholder as common stock; rather, the purpose was to provide a new method for North Carolina corporations to raise needed capital by readily available cash infusions from shareholders in exchange for stock redeemable at their request. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

Agreement Entered into Prior to Amendment. — Where former shareholder had a note in exchange for the redemption of his shares in corporation, the note was unenforceable under former § 55-52, as subdivision (c)(3), rather than subdivision (b)(4) thereof, applied. First, subdivision (b)(4) was an amendment to the original provision and was effective in 1985, while the agreement between former shareholder and debtor corporation was executed before the amendment was in effect; second, subdivision (b)(4) was established to enable corporations to enter agreements with shareholders for the issuance of stocks. In the instant case former shareholder and debtor entered into a written agreement some ten years after the issuance of the shares for the sale of the common stock which former shareholder owned. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

Solvency Test for Each Payment Under Former § 55-52(c). — Since former § 55-52 specifically included the words "and pay for" in subsection (c), a solvency test for surplus had to occur each time a corporation made a payment on the indebtedness out of the assets of the corporation. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

Redemption Agreement Held Unenforceable. — Promissory note to a former shareholder in exchange for the redemption of his shares in corporation and underlying security interest were rendered unenforceable due to the corporation's subsequent insolvency and inability to make payment on the obligation out of sufficient surplus of corporate assets. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989), decided under the former Business Corporation Act.

Part 4. Distributions.

§ 55-6-40. Distributions to shareholders.

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c).

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a purchase, redemption, or other acquisition of the corporation's shares), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, and may determine asset values either on book values or on a fair valuation or other method that is reasonable in the circumstances.

(e) Except as provided in subsection (g), the effect of a distribution under subsection (c) is measured:

(1) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed;

(3) In all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent otherwise provided by agreement.

(g) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (c) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If an indebtedness with such terms is issued as a distribution, each payment of principal or interest is treated as a distribution the effect of which is measured on the date the payment is actually made.

(h) Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action. If a court orders the payment of a dividend, the amount ordered to be paid shall be a debt of the corporation.

(i) As used in this subsection, net profits shall mean such net profits as can lawfully be paid in dividends to a particular class of shares after making allowance for the prior claims of shares, if any, entitled to preference in the payment of dividends. If during its immediately preceding fiscal period a corporation having less than 25 shareholders on the final day of said period has not paid to any class of shares dividends in cash or property amounting to at least one-third of the net profits of said period allocable to that class, the holder or holders of twenty percent (20%) or more of the shares of that class may, within four months after the close of said period, make written demand upon the corporation for the payment of additional dividends for that period. After a corporation has received such a demand, the directors shall, during the then current fiscal period or within three months after the close thereof, either (i) cause dividends in cash or property to be paid to the shareholders of that class in an amount equal to the difference between the dividends paid in said preceding fiscal period to shareholders of that class and one-third of the net profits of said period allocable to that class, or in such lesser amount as may be demanded, or (ii) give notice pursuant to subsection (j) of this section to all shareholders making such demand. Such corporation shall not, however, be required to pay dividends pursuant to such demand insofar as (i) such payment would exceed fifty percent (50%) of the net profits of the current fiscal period in which such demand is made, or (ii) the net profits are being retained to eliminate a deficit, or (iii) the payment of dividends would be a breach of a bona fide agreement between the corporation and its creditors restricting the payment of dividends, or (iv) the directors of the corporation can show that its earnings are being retained to meet the reasonably anticipated needs of the business and that such retention of earnings is not inequitable in light of all the circumstances. Upon receipt of such a demand a corporation may elect to treat any dividend previously paid in the current fiscal period as having been paid in the preceding fiscal period, in which event the corporation shall so notify all shareholders. If a dividend is paid in satisfaction of a demand made in accordance with this subsection it shall be deemed to have been paid in the period for which it was demanded, and all shareholders shall be so informed concurrently with such payment.

(j) Upon receipt of a demand from the holders of twenty percent (20%) or more of the shares of any class of shares pursuant to subsection (i) of this section, the corporation receiving such demand may, during the then fiscal period or within three months after the close thereof, give written notice to each shareholder making such written demand that the corporation elects to redeem all shares held by such shareholder in lieu of the payment of dividends as provided in subsection (i) of this section and shall pay to such shareholder the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice. A shareholder receiving such notice shall thereafter be entitled to withdraw his dividend demand by giving written notice of such withdrawal to the corporation within 10 days after receipt of the redemption notice of the corporation or, if no such withdrawal is made, to receive the fair value of his shares, subject only to the surrender by him of the certificate or certificates representing his shares and to the provisions of G.S. 55-6-31, which value shall be determined and paid as follows:

(1) If within 30 days after the date upon which a shareholder becomes entitled to payment for his shares under this subsection, the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.

(2) If within the such 30-day period the shareholder and the corporation do not agree as to the value of the shares, the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40A for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. Upon payment of the judgment, the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

(k) Nothing in this section shall impair any rights which a shareholder may have on general principles of equity to compel the payment of dividends. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., ss. 1191, 1192; C.S., ss. 1178, 1179; 1927, c. 121; 1933, c. 354, s. 1; G.S., ss. 55-115, 55-116; 1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, ss. 16, 19, 35; 1963, c. 666; 1965, c. 726; 1967, c. 1163; 1969, c. 751, ss. 21-27, 45; 1973, c. 469, ss. 17-20; c. 683; c. 1067; c. 1087, ss. 3-5; 1975, c. 19, s. 17; c. 304; 1985, c. 117, s. 3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.9; 1991, c. 645, s. 4.)

AMENDED NORTH CAROLINA COMMENTARY

This section introduces significant changes from prior law in the criteria used to determine a corporation's legal capacity to pay dividends and reacquire its shares. The former surplus tests no longer apply. In addition, the provisions of former G.S. 55-52, which limited the circumstances under which a corporation could reacquire its shares, were not brought forward. All distributions to shareholders, whether by dividends or repurchases of shares, are determined by that distribution's impact on the corporation's solvency and the relationship between its assets and liabilities.

The Model Act was modified in subsection (d) to make it clear that for purposes of determining asset values under the equity insolvency and balance sheet tests of subsection (c), the board of directors may use either book values or a current valuation if it is reasonable under the circumstances. For purposes of determining liabilities and assets that are not revalued, the board of directors may rely on financial statements prepared in accordance with reasonable accounting practices and principles.

The Model Act was modified in subsection (f) to clarify that a corporation may agree to secure its indebtedness to a shareholder by granting a deed of trust or other security interest. The shareholder may also agree to subordinate the indebtedness, in whole or in part, to the corporation's indebtedness to its general, unsecured creditors. Absent an agreement either to secure or to subordinate a corporation's indebtedness to a shareholder, such indebtedness will be at parity with the corporation's indebtedness to its general, unsecured creditors.

Subsection (g) was added to the Model Act's provisions to address the question of how to treat a liability that by its own terms cannot be paid if its payment would violate this section. This change required the cross-reference added to subsection (e).

"Nimble dividends" (dividends paid out of current earnings) were expressly authorized under former G.S. 55-50(a)(2). That provision was not brought forward.

Subsections (h), (i), and (j) bring forward the provisions of former G.S. 55-50(k) through (m).

CASE NOTES

Former § 55-50 allowed suit for improper withholding of dividend payments against corporation, directors, majority shareholders and officers of the corporation. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

Failure to State a Cause of Action. — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

Shareholder Held Entitled to Attorneys' Fees. — Plaintiff who brought action as the record owner of 42,748 shares of Preferred A stock of defendant corporation to recover a dividend was entitled to recover attorneys' fees under subsection (h) of former § 55-50. McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp., 98 N.C. App. 151, 389 S.E.2d 636 (1990), aff'd, 330 N.C. 602, 411 S.E.2d 585 (1992).

Disregard of Corporate Entity Upheld. — Trial court was justified in disregarding the corporate entity and holding defendant personally liable to the extent of plaintiff's damages under the contract where defendant, who was president and sole shareholder of company, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for contractual debt to plaintiff. Hudson v. Jim Simmons Pontiac-Buick, Inc., 94 N.C. App. 563, 380 S.E.2d 612 (1989), decided under the former Business Corporation Act.

Cited in McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp., 330 N.C. 602, 411 S.E.2d 585 (1992).

ARTICLE 7.

Shareholders.

Part 1. Meetings.

§ 55-7-02. Special meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(2) Within 30 days after the holders of at least ten percent (10%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held; except however that, unless otherwise provided in the articles of incorporation or bylaws, the call of a special meeting by shareholders is not available to the shareholders of a public corporation.

(b) If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders' meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by G.S. 55-7-05(c) may be conducted at a special shareholders' meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(a).)

§ 55-7-03. Court-ordered meeting.

(a) The superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located may, after notice is given to the corporation, summarily order a meeting to be held:

(1) On application of any shareholder if an annual meeting of the shareholders was not held within 15 months after the corporation's last annual meeting; or

(2) On application of a shareholder who signed a demand for a special meeting valid under G.S. 55-7-02, if the corporation does not proceed to hold the meeting as required by that section.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters), enter other orders necessary to accomplish the purpose or purposes of the meeting, and award such reasonable expenses, including attorneys' fees, as it deems appropriate. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(b).)

Part 2. Voting.

§ 55-7-20. Shareholders' list for meeting.

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders' list must be available for inspection by any shareholder, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, personally or by or with his representative, is entitled on written demand to inspect and, subject to the requirements of G.S. 55-16-02(c), to copy the list, during regular business hours and at his expense, during the period it is available for inspection.

(c) The corporation shall make the shareholders' list available at the meeting, and any shareholder, personally or by or with his representative, is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a shareholder or his representative to inspect the shareholders' list before or at the meeting (or copy the list as permitted by subsection (b)), the superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located, on application of the shareholder, after notice is given to the corporation, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 9.)

§ 55-7-21.1. Rights of holders of debt securities.

In addition to any rights otherwise lawfully conferred, the articles of incorporation of the corporation may confer upon the holders of any bonds, debentures or other debt obligations issued or to be issued by the corporation any one or more of the following powers and rights upon such terms and conditions as may be prescribed in the articles of incorporation:

(1) The power to vote on any matter either in conjunction with or to the full or partial exclusion of its shareholders, notwithstanding G.S. 55-6-01(c)(1), and in determination of votes and voting groups, the holders of such debt obligations shall be treated as shareholders;
(2) The right to inspect the corporate books and records;
(3) Any other rights concerning the corporation which its shareholders have or may have.

Any such power or right shall not be diminished, as to bonds, debentures or other obligations then outstanding, except by an amendment of the articles of incorporation approved by the vote or written consent of the holders of a majority in principal amount thereof or such larger percentage as may be specified in the articles of incorporation. (1969, c. 751, s. 19; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.10; 1991, c. 645, s. 5.)

§ 55-7-25. Quorum and voting requirements for voting groups.

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of that voting group exists with respect to that matter, except that, in the absence of a quorum at the opening of any meeting of shareholders, such meeting may be adjourned from time to time by the vote of a majority of the votes cast on the motion to adjourn. Unless the articles of incorporation, a bylaw adopted by the shareholders, or this act provides otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation, a bylaw adopted by the shareholders, or this Chapter requires a greater number of affirmative votes.

(d) An amendment of the articles of incorporation or bylaws adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (a) or (c) is governed by G.S. 55-7-27.

(e) The election of directors is governed by G.S. 55-7-28. (1901, c. 2, s. 39; Rev., s. 1182; C.S., s. 1175; 1927, c. 138; G.S., s. 55-112; 1955, c. 1371, s. 1; 1973, c. 469, ss. 21, 22; 1989, c. 265, s. 1; 1991, c. 645, s. 16(a).)

§ 55-7-28. Voting for directors; cumulative voting.

(a) Unless otherwise provided in the articles of incorporation or in an agreement valid under G.S. 55-7-31, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Except as provided in subsection (e) of this section, shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors" (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) The meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) A shareholder or proxy who has the right to cumulate his votes announces in open meeting, before voting for directors starts, his intention to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of votes represented in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon.

(e) Shareholders of a corporation incorporated in this State shall have the right to cumulate their votes for directors if

(1) The corporation was in existence prior to July 1, 1957, under a charter which does not grant the right of cumulative voting and at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is at least one stockholder who owns or controls more than one-fourth of the voting stock of such corporation (shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection), or if

(2) The corporation was incorporated on or after July 1, 1957, and before July 1, 1990,

unless, when the stock transfer books are closed or at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting of shareholders, the corporation is a public corporation as defined in G.S. 55-1-40(18a). This right to vote cumulatively may be denied or limited by amendment to the articles of incorporation, but no such amendment shall be made when the number of shares voting against the amendment would be sufficient to elect a director by cumulative voting if such shares are entitled to be voted cumulatively for the election of directors. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C.S., s. 1173; 1945, c. 635; G.S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35; 1985, c. 419; 1985 (Reg. Sess., 1986), c. 801, s. 45; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.11; 1991, c. 645, ss. 16(b), 19.)

AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to clarify that an agreement valid under G.S. 55-7-31 may modify the vote by which directors are elected.

For corporations incorporated on or after July 1, 1990, subsection (b) changes prior law, which mandated cumulative voting except with respect to corporations having shares listed on national securities exchanges or held by more than 2,000 holders of record. A corporation may elect to retain cumulative voting by a provision in its articles of incorporation or in a shareholders' agreement complying with G.S. 55-7-31.

The provisions of subdivision (d)(2) were modified from the Model Act to conform with prior law with respect to the manner of electing to vote cumulatively.

Subsection (e) is a transitional provision that preserves cumulative voting for substantially all corporations that had cumulative voting by law prior to July 1, 1990.

Part 4. Derivative Proceedings.

§ 55-7-40. Shareholders' derivative actions.

Subject to the provisions of G.S. 55-7-41 and G.S. 55-7-42, a shareholder may bring a derivative proceeding in the superior court of this State. The superior court has exclusive original jurisdiction over shareholder derivative actions. (1973, c. 469, s. 12; 1989, c. 265, s. 1; 1995, c. 149, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date, rewrote this section.

Legal Periodicals. —

For note, "Shareholder Derivative Suits Under the New North Carolina Business Corporation Act," see 68 N.C. L. Rev. 1091 (1990).

CASE NOTES

No Standing to Bring Suit Without Beneficial Interest. — Plaintiff had no standing to bring suit challenging action of corporation where he failed to maintain his status as a holder of a beneficial interest in the stock of that corporation throughout the pendency of the litigation. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Plaintiff had no standing to challenge a loan made by defendant corporation to other defendant when plaintiff's beneficial interest, if any, in the defendant corporation consisted of a pledge of stock which secured a debt that was paid by another pledgee of the stock before plaintiff filed suit. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Effect of Futility Doctrine. — The futility doctrine does not allow a shareholder to bring a claim directly. Rather, it simply allows a shareholder to bring a derivative claim without first making demand upon corporate management. Thus, this doctrine offered no support to plaintiff's attempt to recover directly for the breach of his fellow directors' fiduciary duty to corporation. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Pledgee of corporate stock has a significant beneficial interest to have standing to sue the corporation derivatively for mismanagement, provided he maintains an equitable interest in the collateral. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Demand for Action by Directors as Prerequisite. —

Minutes of board of directors meeting introduced into evidence by plaintiff confirmed that plaintiff made a motion that the corporation retain counsel to investigate the usurpation of a commercial leasing deal, and that this motion died for lack of a second. This action satisfied the demand requirement of this section, and any further demand would have been futile. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Recommendation of Special Litigation Committee. —

The burden is on the movant, usually the corporation on whose behalf the suit was initiated, to prove the independence, disinterestedness, and appropriate qualifications of the committee and that it conducted a reasonable investigation in good faith of the matters alleged in the complaint. The committee is not entitled to a presumption of independence, disinterestedness, good faith, or reasonableness. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

In exercising its own independent business judgment, the court must consider "such ethical, commercial, promotional, public relations and fiscal factors as may be involved in a given situation." Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

The corporation as the party seeking final disposition of the case under former § 55-55(c) (see now subsection (d) of this section) has the burden of going forward with evidence, on such items, and to show that continuing the action is more likely than not to be against the interests of the corporation. Of course, the shareholders initiating the suit are also entitled to present evidence and arguments as to their contentions. Ultimately, however, while "the review contemplated does not lend itself to any formula-like approach," it is for the court to decide whether the case begun in the superior court will continue. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Trial judge may allow discovery to enable him to assess the committee of decision-makers, the investigation made by the committee, the findings of the committee, and the recommendation of the committee. After hearing evidence on these matters, the trial court is to determine the independence, disinterestedness, and good faith of the committee in making its investigation, in addition to the reasonableness of the bases relied upon by the committee in concluding and recommending that the cause of action on behalf of the corporation be disposed of as recommended. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Plaintiffs were not required to pursue statutory dissenters' rights under former § 55-113 (see now Art. 13 of ch. 55) to oppose merger during litigation in order to maintain standing. Subdivision (c) of former § 55-113 would have deprived them of all interest in defendant corporation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Responsibility of Court When Party Challenges Recommendation of Corporation. — Since proceedings under former § 55-55(c) (see now subsection (d) of this section) are held before a trial judge sitting without a jury, when a party challenges the recommendation of the corporation in whose name a lawsuit was initiated derivatively, it is the court's responsibility first, to require the party taking issue with the recommendation to outline his contentions so he may receive an appropriate response from the other parties to the suit, and then secondly, to hear evidence on these contentions, in order to be able to determine whether the lawsuit is to be discontinued, dismissed, settled, or turned over to the plaintiff-shareholders or the corporation for litigation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

There was no requirement of continuing share ownership in former § 55-55 in order for an individual, who was a shareholder at the time of the transaction about which he was complaining and at the time the action was filed, to proceed with a derivative action. Had the legislature intended to include such a requirement in the corporate statutes, it would have done so. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Section Does Not Contain Continuing Share Ownership Requirement. — This section, the new statute, while elaborating some of the procedures set forth in former § 55-55, does not contain a continuing share ownership requirement. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

No State Constitutional Right Exists to Trial by Jury of Factual Issues. — Although a litigant's right to have a jury try issues of fact concerning the merits of the action initiated by the filing of a derivative suit complaint is guaranteed by the Constitution of North Carolina, the procedure required by former § 55-55(c) (see now subsection (d) of this section) did not exist before the adoption of the Constitution of 1868, and therefore no State constitutional right exists to a trial by jury of factual issues that might arise during the course of the proceedings required under this statute. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

A litigant has no right to the determination of factual issues by a jury during proceedings occurring pursuant to former § 55-55(c) (see now subsection (d) of this section). In this section of the statute, it is clear that the word "court" referred to the trial judge and not to a jury. The remaining sentences of former § 55-55(c) referred to discretionary decisions exercisable properly only by the trial judge; clearly the legislature did not intend that a jury be involved in the procedures required under former § 55-55(c). Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Jury Properly Not Involved In Deciding Future of Case. — The trial judge proceeded properly insofar as he did not involve a jury in the decision whether to allow the case to be discontinued, dismissed, compromised or settled. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Judge May Need to Resolve Fact Issues to Determine Future of Case. — As the judicial official charged under former § 55-55(c) (see now subsection (d) of this section) with this authority, the trial judge may well have to resolve issues of fact to decide whether to permit the suit to go forward, be settled, or be dismissed. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Judge, Not Jury, Decides Whether Case Will Be Settled, Dismissed, etc. — The hearing on motions filed under former § 55-55(c) (see now subsection (d) of this section) was appropriately held by the trial judge sitting without a jury. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Trial Court's Review of Motions to Settle, Dismiss, Compromise or Discontinue. — The trial court is to undertake a two-step review of motions brought under former § 55-55(c) (see now subsection (d) of this section): First, it is to decide whether the proposal for disposition of the case which is submitted to the court was reached by qualified independent disinterested decision-makers who in good faith proceeded to thoroughly investigate and evaluate the claims set forth in the complaint. The second step requires the trial court to exercise its own independent business judgment as to whether the case is to be discontinued, dismissed, compromised or settled. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Procedure and Discovery in Hearing Concerning Motion to Dismiss, Settle, etc. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholder's derivative action, particularly with respect to former § 55-55(c) (see now subsection (d) of this section) and § 1A-1, Rules 12, 23 and 56. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Rule 23.1, Fed. R. Civ. P., is entirely consistent with this section, as this section allows for a device that the federal rule does not contemplate. The terms of Rule 23.1 and the appointment of a committee pursuant to this section both can be fully honored in a federal court sitting in diversity. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

Appointment of a committee under subsection (c) of this section is generally more appropriate in the context of a publicly held corporation, or at the very least within a close corporation with more than two owners. The appointment of a committee would likely only delay litigation in action brought by minority shareholders of close corporation alleging breach of fiduciary duties and deceptive and unfair trade practices. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

Issuance of Stay Pending Committee Report. — The language of subsection (c), while not expressly granting it, contemplates the issuance of a stay pending the committee's report. The appointment of a committee would be meaningless if the litigation were allowed to continue pending its investigation. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

Quoted in Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 151 (E.D.N.C. 1993).

§ 55-7-40.1. Definitions.

In this Part:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in G.S. 55-7-47, in the right of a foreign corporation.

(2) "Shareholder" has the same meaning as in G.S. 55-1- 40 and includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the beneficial owner's behalf. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-41. Standing.

A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time; and

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-42. Demand.

No shareholder may commence a derivative proceeding until:

(1) A written demand has been made upon the corporation to take suitable action; and

(2) 90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-43. Stay of proceedings.

If the corporation commences an inquiry into the allegations set forth in the demand or complaint, the court may stay a derivative proceeding for a period of time the court deems appropriate. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-44. Dismissal.

(a) The court shall dismiss a derivative proceeding on motion of the corporation if one of the groups specified in subsection (b) or (f) of this section determines in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interest of the corporation.

(b) Unless a panel is appointed pursuant to subsection (f) of this section, the inquiry and determination shall be made by:

(1) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or

(2) A majority vote of a committee consisting of two or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors constituted a quorum.

(c) For purposes of this section, none of the following factors by itself shall cause a director to be considered not independent:

(1) The nomination or election of the director by persons who are defendants in the derivative proceeding or against whom action is demanded;

(2) The naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or

(3) The approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

(d) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing that the requirements of subsection (a) of this section have not been met. Defendants may make a motion to dismiss a complaint under subsection (a) of this section for failure to comply with this subsection. Prior to the court's ruling on such a motion to dismiss, the plaintiff shall be entitled to discovery only with respect to the issues presented by the motion and only if and to the extent that the plaintiff has alleged such facts with particularity. The preliminary discovery shall be limited solely to matters germane and necessary to support the facts alleged with particularity relating solely to the requirements of subsection (a) of this section.

(e) If a majority of the board of directors does not consist of independent directors at the time the determination is made, the corporation shall have the burden of proving that the requirements of subsection (a) of this section have been met. If a majority of the board of directors consists of independent directors at the time the determination is made, the plaintiff shall have the burden of proving that the requirements of subsection (a) of this section have not been met.

(f) The court may appoint a panel of one or more independent persons upon motion of the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interest of the corporation. The plaintiff shall have the burden of proving that the requirements of subsection (a) of this section have not been met. (1995, c. 149, s. 1; c. 509, s. 135.2(t).)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

Effect of Amendments. — Session Laws 1995, c. 509, s. 135.2(t), effective October 1, 1995, in subsection (d) inserted "under subsection (a) of this section", and substituted "such a motion to dismiss" for "a motion to dismiss for failure to comply with this subsection."

§ 55-7-45. Discontinuance or settlement.

(a) A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

(b) The court shall determine the manner and form of the notice and the manner in which costs of the notice shall be borne. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-46. Payment of expenses.

On termination of the derivative proceeding, the court may:

(1) Order the corporation to pay the plaintiff's reasonable expenses, including attorneys' fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation;

(2) Order the plaintiff to pay any defendant's reasonable expenses, including attorneys' fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or

(3) Order a party to pay an opposing party's reasonable expenses, including attorneys' fees, incurred as a result of the filing of a pleading, motion, or other paper, if the court, after reasonable inquiry, finds that the pleading, motion, or other paper was not well grounded in fact or was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-47. Applicability to foreign corporations.

In any derivative proceeding in the right of a foreign corporation, the matters covered by this Part shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for the matters governed by G.S. 55-7-43, 55-7-45, and 55-7-46. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-48. Suits against directors of public corporations.

In addition to the requirements of this Part, the plaintiff in an action brought on behalf of a corporation that is a public corporation at the time of the action against one or more of its directors for monetary damages shall:

(1) Allege, and it must appear, that each plaintiff has been a shareholder or holder of a beneficial interest in shares of the corporation for at least one year;

(2) Bring the action within two years of the date of the transaction of which the plaintiff complains; and

(3) If the court orders, execute and deposit with the clerk of court a written undertaking with sufficient surety, approved by the court, to indemnify the corporation against any and all expenses reasonably expected to be incurred by the corporation in connection with the proceeding, including expenses arising by way of indemnity. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

§ 55-7-49. Privileged communications.

In any derivative proceeding, no shareholder shall be entitled to obtain or have access to any communication within the scope of the corporation's attorney-client privilege that could not be obtained by or would not be accessible to a party in an action other than on behalf of the corporation. (1995, c. 149, s. 1.)

Editor's Note. — Session Laws 1995, c. 149, s. 2, made this section effective October 1, 1995, and applicable to actions upon which shareholder derivative suits are based occurring on or after that date.

ARTICLE 8.

Directors and Officers.

Part 1. Board of Directors.

§ 55-8-01. Requirement for and duties of board of directors.

Legal Periodicals. —

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "Discrimination, Managerial Discretion and the Corporate Contract," see 26 Wake Forest L. Rev. 541 (1991).

For note, "Ignorance is not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines," see 1992 Duke L.J. 145.

§ 55-8-03. Number and election of directors.

(a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The shareholders may from time to time increase or decrease the number of directors by amendment to the articles of incorporation or the bylaws, but no such decrease shall be made for a corporation to which G.S. 55-7-28(e) is applicable when the number of shares voting against the proposal for decrease would be sufficient to elect a director by cumulative voting if such shares are entitled to be voted cumulatively for the election of directors. If a board of directors has power under the articles of incorporation or bylaws to fix or change the number of directors and if the shareholders do not have the right to cumulate their votes for directors, the board may increase or decrease the number of directors by not more than thirty percent (30%) during any 12-month period.

(c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or (unless the articles of incorporation or an agreement valid under G.S. 55-7-31 shall otherwise provide) the board of directors. After shares are issued, only the shareholders may change the range for the size of the board or change from a fixed to a variable-range size board or vice versa.

(d) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under G.S. 55-8-06. (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11; 1989, c. 265, s. 1; 1993, c. 552, s. 13.)

§ 55-8-06. Staggered terms for directors.

If the number of directors is fixed at nine or more directors, the articles of incorporation or bylaws adopted by the shareholders may provide for staggering their terms by dividing the total number of directors into two, three, or four groups, with each group containing one-half, one-third, or one-fourth of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, the terms of the third group, if any, expire at the third annual shareholders' meeting after their election, and the terms of the fourth group, if any, expire at the fourth annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two, three, or four years, as the case may be, to succeed those whose terms expire. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C.S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917; G.S., s. 55-48; 1955, c. 914, s. 1; c. 1371, s. 1; 1959, c. 1316, s. 7; 1989, c. 265, s. 1; 1993, c. 552, s. 10.)

§ 55-8-07. Resignation of directors.

(a) A director may resign at any time by communicating his resignation to the board of directors, its chairman, or the corporation.

(b) A resignation is effective when it is communicated unless it specifies in writing a later effective date or subsequent event upon which it will become effective. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1.)

Editor's Note. — This section is set out to correct an error in subsection (a) of this section as it appears in the main volume.

§ 55-8-08. Removal of directors by shareholders.

(a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

(c) If cumulative voting is authorized, unless the entire board of directors is to be removed, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

(d) A director may not be removed by the shareholders at a meeting unless the notice of the meeting states that the purpose, or one of the purposes, of the meeting is removal of the director.

(e) Unless otherwise provided in the articles of incorporation or a bylaw adopted by the shareholders, the entire board of directors may be removed from office with or without cause by the affirmative vote of a majority of the votes entitled to be cast at any election of directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 1991, c. 645, s. 6.)

AMENDED NORTH CAROLINA COMMENTARY

This section is consistent with prior law as contained in former G.S. 55-27(f) with two notable differences. This section does not contain a specific provision allowing removal of the entire board by a majority vote, and the notice requirement of subsection (d) is new. Subsection (d) does not prohibit removal of a director by unanimous consent (*see* G.S. 55-7-04) but requires notice if the removal is to be considered at a meeting. The language of the Model Act was modified in this subsection for clarity.

§ 55-8-10. Vacancy on board.

(a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including, without limitation, a vacancy resulting from an increase in the number of directors or from the failure by the shareholders to elect the full authorized number of directors:

(1) The shareholders may fill the vacancy;
(2) The board of directors may fill the vacancy; or
(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the

affirmative vote of a majority of all the directors, or by the sole director, remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the remaining director or directors elected by that voting group or the holders of shares of that voting group are entitled to fill the vacancy.

(c) A vacancy that will occur upon a specific later date or subsequent event (by reason of a resignation effective upon a later date or subsequent event under G.S. 55-8-07(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.12.)

AMENDED NORTH CAROLINA COMMENTARY

This section is generally consistent with prior law. However, unlike the present section, former G.S. 55-27(c) permitted the bylaws as well as the articles of incorporation to withhold from directors the power to fill board vacancies and did not permit the directors to fill vacancies created by an increase in the authorized number of directors, except within a minimum-maximum range fixed by the shareholders.

This section expands the comparable Model Act section in subsection (a) by explicitly recognizing a vacancy occurring from failure by the shareholders to elect a full board and in subsection (b) by permitting the remaining directors elected by a voting group to fill a vacancy in that class of directors, both of which are consistent with former G.S. 55-27(c). The Model Act was modified in subsection (c) to conform to the changes made in G.S. 55-8-07(b) regarding the effective date of a resignation.

Part 2. Meetings and Action of the Board.

§ 55-8-20. Meetings.

(a) The board of directors may hold regular or special meetings in or out of this State.

(b) Unless otherwise provided by the articles of incorporation, the bylaws, or the board of directors, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

(c) Unless the bylaws provide otherwise, special meetings of the board of directors may be called by the president or any two directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1969, c. 751, s. 12; 1973, c. 469, ss. 8-10; 1989, c. 265, s. 1; 1991, c. 645, s. 7.)

§ 55-8-24. Quorum and voting.

CASE NOTES

No Cause of Action Stated. — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v.

Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

§ 55-8-25. Committees.

AMENDED NORTH CAROLINA COMMENTARY

The powers which may not be delegated to committees, specified in subsection (e) of this section, are different and more extensive than those specified in former G.S. 55-31(a). Also, this section contains no counterpart of former G.S. 55-31(c), which expressly held the board responsible for action of its committees. This difference is moderated by subsection (f) of the present section.

Part 3. Standards of Conduct.

§ 55-8-30. General standards for directors.

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or

(3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.

(e) A director's personal liability for monetary damages for breach of a duty as a director may be limited or eliminated only to the extent permitted in G.S. 55-2-02(b)(3), and a director may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 11.)

Legal Periodicals. —

For article, "The Duty of Directors to Non-Shareholder Constituencies in Control Transactions — A Comparison of U.S. and U.K. Law," see 25 Wake Forest L. Rev. 61 (1990).

CASE NOTES

Duty Owed to Minority Shareholders. —

Evidence was sufficient to establish a breach of defendant's fiduciary duty to plaintiff as a minority shareholder. Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993).

Fiduciary Duty as Question Where Revolving Fund Certificate Was Issued. — Revolving fund certificate held by plaintiff issued in exchange for stock sold to defendant had some characteristics of a corporation/shareholder relationship; therefore, issue of whether defendants owed plaintiff a fiduciary duty was properly submitted to the jury. HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868, reversed on other grounds, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991), appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 325 N.C. 271, 382 S.E.2d 439 (1989), decided under the former Business Corporation Act.

Balance Sheet Insolvency. — For a corporate director to breach a fiduciary duty to a creditor, the transaction at issue must occur under circumstances amounting to a "winding up" or dissolution of the corporation; balance sheet insolvency, absent such circumstances, is insufficient to give rise to a breach of fiduciary duty to creditors of a corporation. Whitley v. Carolina Clinic, Inc., 118 N.C. App. 523, 455 S.E.2d 896 (1995).

Genuine Issue of Material Fact Shown. — Where defendants submitted a number of affidavits tending to substantiate their version of the facts and where plaintiff responded with evidence which, if believed, would enable a jury to find in the corporation's favor, the parties' submissions created a genuine issue of material fact as to whether defendants breached their duty of loyalty by diverting a deal from the corporation for which they were directors to another corporation so as to warrant denial of defendants' summary judgment motion. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Issues regarding knowledge, intent and motive, in determining whether directors' actions were taken in good faith in order to further the interests of the corporations, depend upon credibility of witnesses and are therefore not amenable to resolution on summary judgment. Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

Stated in IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

§ 55-8-31. Director conflict of interest.

Legal Periodicals. —

For article, "Fairness and Trust in Corporate Law," see 1993 Duke L.J. 425.

CASE NOTES

Adversely Interested Party Must Prove, etc. —

Where officer of corporation engaged in transactions which were not approved by the corporate defendants or shareholders, the burden was on him to prove that the transactions were just and reasonable. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

§ 55-8-33. Liability for unlawful distributions.

CASE NOTES

Trial court was justified in disregarding the corporate entity and holding defendant personally liable to the extent of plaintiff's damages under the contract where defendant, who was president and sole shareholder of company, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for contractual debt to plaintiff. Hudson v. Jim Simmons Pontiac-Buick, Inc., 94 N.C. App. 563, 380 S.E.2d 612 (1989), decided under the former Business Corporation Act.

No Cause of Action Stated. — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

Part 4. Officers.

§ 55-8-40. Officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The secretary or any assistant secretary or any one or more other officers designated by the bylaws or the board of directors shall have the responsibility and authority to maintain and authenticate the records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation, but no individual may act in more than one capacity where action of two or more officers is required.

(e) Whenever a specific office is referred to in this Chapter, it shall be deemed to include any individual who, alone or collectively with one or more other individuals, holds or occupies such office. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.13.)

AMENDED NORTH CAROLINA COMMENTARY

This section was adapted from the corresponding section of the Model Act with several changes. The word "required" was deleted from the catchline of the section because it covers officers that are optional as well as those that are required.

No changes were made in subsections (a) and (b). Subsection (b) permits the board of directors to authorize officers to appoint other officers or assistant officers, whereas former G.S. 55-34 was silent on this point. The drafters were in favor of this provision but noted that the appointment should be documented as a practical matter, e.g., in the minute books.

Subsection (c) was changed to designate the secretary or any assistant secretary as the officers who have responsibility and authority to maintain and authenticate corporate records, subject to any other provision in the bylaws, in accordance with existing practice, and subsection (d) was changed by adding the final clause relating to acting in a dual capacity when the action of more than one officer is required, thus conforming to former G.S. 55-34(a). Subsection (e) brings forward the last sentence of former G.S. 55-34(a) with updated terminology.

§ 55-8-42. Standards of conduct for officers.

CASE NOTES

Fiduciary Duty as Question Where Revolving Fund Certificate Was Issued. — Revolving fund certificate held by plaintiff issued in exchange for stock sold to defendant had some characteristics of a corporation/shareholder relationship; therefore, issue of whether defendants owed plaintiff a fiduciary duty was properly submitted to the jury. HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868, rev'd on other grounds, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991) (decided under the former Business Corporation Act).

Stated in IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

Part 5. Indemnification.

§ 55-8-50. Policy statement and definitions.

(a) It is the public policy of this State to enable corporations organized under this Chapter to attract and maintain responsible, qualified directors, officers, employees and agents, and, to that end, to permit corporations organized under this Chapter to allocate the risk of personal liability of directors, officers, employees and agents through indemnification and insurance as authorized in this Part.

(b) Definitions in this Part:

(1) "Corporation" includes any domestic or foreign corporation absorbed in a merger which, if its separate existence had continued, would have had the obligation or power to indemnify its directors, officers, employees, or agents, so that a person who would have been entitled to receive or request indemnification from such corporation if its separate existence had continued shall stand in the same position under this Part with respect to the surviving corporation.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" means expenses of every kind incurred in defending a proceeding, including counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(4a) "Officer", "employee", or "agent" includes, unless the context requires otherwise, the estate or personal representative of a person who acted in that capacity.

(5) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in G.S. 55-8-56, the office in a corporation held by the officer or the employment or agency relation-

ship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1; 1993, c. 552, s. 12.)

§ 55-8-51. Authority to indemnify.

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) He conducted himself in good faith; and

(2) He reasonably believed (i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests; and (ii) in all other cases, that his conduct was at least not opposed to its best interests; and

(3) In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of no contest or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section:

(1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) In connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation that is concluded without a final adjudication on the issue of liability is limited to reasonable expenses incurred in connection with the proceeding.

(f) The authorization, approval or favorable recommendation by the board of directors of a corporation of indemnification, as permitted by this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such indemnification shall be void or voidable on such ground. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1.)

Editor's Note. — The section above is set out to correct a typographical error in subsection (c).

§ 55-8-57. Additional indemnification and insurance.

(a) In addition to and separate and apart from the indemnification provided for in G.S. 55-8-51, 55-8-52, 55-8-54, 55-8-55 and 55-8-56, a corporation may in its articles of incorporation or bylaws or by contract or resolution indemnify or agree to indemnify any one or more of its directors, officers, employees, or agents against liability and expenses in any proceeding (including without limitation a proceeding brought by or on behalf of the corporation itself) arising out of their status as such or their activities in any of the foregoing capacities; provided, however, that a corporation may not indemnify or agree to indemnify a person against liability or expenses he may incur on account of his activities which were at the time taken known or believed by him to be clearly in conflict with the best interests of the corporation. A corporation may likewise and to the same extent indemnify or agree to indemnify any person who, at the request of the corporation, is or was serving as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprise or as a trustee or administrator under an employee benefit plan. Any provision in any articles of incorporation, bylaw, contract, or resolution permitted under this section may include provisions for recovery from the corporation of reasonable costs, expenses, and attorneys' fees in connection with the enforcement of rights to indemnification granted therein and may further include provisions establishing reasonable procedures for determining and enforcing the rights granted therein.

(b) The authorization, adoption, approval, or favorable recommendation by the board of directors of a public corporation of any provision in any articles of incorporation, bylaw, contract or resolution, as permitted in this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such articles of incorporation or bylaw provision or contract or resolution shall be void or voidable on such grounds. The authorization, adoption, approval, or favorable recommendation by the board of directors of a nonpublic corporation of any provision in any articles of incorporation, bylaw, contract or resolution, as permitted in this section, which occurred prior to July 1, 1990, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such articles of incorporation, bylaw provision, contract or resolution shall be void or voidable on such grounds. Except as permitted in G.S. 55-8-31, no such bylaw, contract, or resolution not adopted, authorized, approved or ratified by shareholders shall be effective as to claims made or liabilities asserted against any director prior to its adoption, authorization, or approval by the board of directors.

(c) A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under any provision of this Chapter. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5; 1985 (Reg. Sess., 1986), c. 1027, ss. 35-38; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.14.)

AMENDED NORTH CAROLINA COMMENTARY

Section 8.57 of the Model Act is entitled "Insurance" and deals only with that subject. In the North Carolina version the catchline has been expanded and the section is intended to permit broad nonstatutory indemnification completely in addition to and notwithstanding any other provisions of this Act. G.S. 55-8-50(a) expressly states that purpose and declares it to be the public policy of North Carolina.

This section permits indemnification, insurance and reimbursement of expenses in addition to, and notwithstanding, any other provisions of this Chapter. The section embodies the public policy of this State set forth in G.S. 55-8-50(a) to permit a corporation organized under this Chapter to spread the risk of corporate management, notwithstanding any other general or special law of this State or of any other jurisdiction including the federal government.

Subsection (a) permits and defines the scope of contractual indemnification under which the corporation, essentially as a self-insurer, may commit in advance to indemnify its directors, officers, employees or agents. This provision brings forward and clarifies all of former G.S. 55-19(a), which was added by the 1986 amendments. It adds an express statement, for example, that a corporation may agree in advance to indemnify its personnel even in a corporate or derivative action, subject only to the limitation brought forth from former G.S. 55-19(a).

Similarly, subsection (b) brings forward former G.S. 55-19(b) relating to the conflict of interest rules in G.S. 55-8-31 (which replaced former G.S. 55-30), but the application of the subsection to indemnification plans adopted on or after July 1, 1990 has been limited to public corporations (i.e., those required to file reports under Section 12 of the Securities Exchange Act of 1934). This limitation to public corporations was considered appropriate because (1) former G.S. 55-19(b) was intended to deal with the need to attract qualified outside directors — a need experienced mainly by public corporations, (2) shareholders of public corporations receive current disclosure of material changes in the indemnification scheme, and (3) shareholders have an active market in which they can dispose of their shares if they disapprove of a particular scheme of indemnification. Subsection (b) does not prevent a shareholder from challenging indemnification in a particular case. Instead, its effect is to shift to the shareholder of a public corporation the burden of proving that indemnification constitutes a breach of duty to the corporation under all of the facts and circumstances, including the facts and circumstances existing at the time indemnification was authorized or approved.

Subsection (c) replaces former G.S. 55-19(c) with section 8.57 of the Model Act because the drafters concluded that these insurance provisions of the Model Act are broader and clearer than former G.S. 55-19(c). Subsection (c) applies whether or not a corporation provides additional indemnification pursuant to subsections (a) and (b). As previously noted, former G.S. 55-19(d) was brought forward as G.S. 55-8-53.

ARTICLE 9.

Shareholder Protection Act.

§ 55-9-01. Short title and definitions.

Legal Periodicals. — For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

§ 55-9-05. Exemptions.

The provisions of G.S. 55-9-02 shall not be applicable to any corporation that shall be made the subject of a business combination by an other entity if: (i) the corporation was not a public corporation (as defined in G.S. 55-1-40(18a)) at the time such other entity acquired in excess of ten percent (10%) of the voting shares; (ii) on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors), the board of directors of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, (other than a corporation described in G.S. 55-9-05(iii)) adopted a bylaw stating that the provisions of this Article shall not be applicable to the corporation; (iii) in the case of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, as the result of adoption by its board of directors under G.S. 55-9-05(ii) of a bylaw providing that G.S. 55-9-02 not apply to such corporation, the board of directors of such corporation shall not have rescinded such bylaw on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors); (iv) in the case of a corporation (including its predecessors) which becomes a public corporation for the first time after July 1, 1990, such corporation adopts a bylaw within 90 days of becoming a public corporation stating that the provisions of this Article shall not be applicable to it; (v) in the case of a newly formed corporation after April 23, 1987, the initial articles of incorporation of the corporation shall provide that the provisions of this Article shall not be applicable; or (vi) such business combination was the subject of an existing agreement of the corporation on April 23, 1987. Neither the adoption or failure to adopt a bylaw of the type set forth in G.S. 55-9-05(ii) or (iv) nor the rescission or failure to rescind a bylaw of the type referred to in G.S. 55-9-05(iii) shall constitute grounds for any cause of action, at law or in equity, against the corporation or any of its directors. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.15.)

ARTICLE 9A.

Control Share Acquisitions.

§ 55-9A-01. Short title and definitions.

(a) The provisions of this Article shall be known and may be cited as The North Carolina Control Share Acquisition Act.

(b) In this Article:

(1) "Beneficial ownership" of shares means the sole or shared ownership of any shares or the sole or shared power to vote

any shares or to direct the exercise of voting power of any shares, whether such ownership or power is direct or indirect or through any contract, arrangement, understanding, relationship or otherwise, and includes shares beneficially owned by any person acting in concert with such beneficial owner pursuant to any contract, arrangement, understanding, relationship or otherwise. Notwithstanding the foregoing, beneficial ownership does not include shares acquired in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this Article, unless the acquiror of such shares may exercise or direct the exercise of voting of such shares without instruction from others.

(2) "Control shares" means shares of a covered corporation that when added to all other shares of the corporation beneficially owned by a person would entitle (except for this Article) that person to voting power in the election of directors that is equal to or greater than any of the following levels of voting power:
  a. One-fifth of all voting power.
  b. One-third of all voting power.
  c. A majority of all voting power.

(3) "Control share acquisition" means the acquisition by any person of beneficial ownership of control shares, except that the acquisition of beneficial ownership of any shares of a covered corporation does not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:
  a. Before April 30, 1987.
  b. Pursuant to a contract existing before April 30, 1987, with either:
    (i) The covered corporation; or
    (ii) A seller of such shares who owned such shares before April 30, 1987.
  c. Pursuant to the laws of descent and distribution.
  d. Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this Article.
  e. Pursuant to a merger or share exchange effected in compliance with applicable law, but only if pursuant to an agreement of merger or share exchange to which the covered corporation is a party.
  f. Pursuant to the sale of such shares by the covered corporation or its parent or subsidiary corporation.
  g. Pursuant to a written agreement to which the covered corporation is a party that permits the purchasers of shares from the covered corporation or its parent or subsidiary corporation also to purchase in any manner within 90 days before or after the purchase from the covered corporation or its parent or subsidiary up to the same aggregate number of shares as were sold by the covered corporation or its parent or subsidiary corporation.
  h. By an employee benefit plan established by the covered corporation.
  i. Before the corporation became a covered corporation.

For purposes of this definition, shares acquired within any consecutive 90-day period or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

(4) "Interested shares" means the shares of a covered corporation beneficially owned by any of the following persons:
  a. Any person who has acquired or proposes to acquire control shares in a control share acquisition.
  b. Any officer of the covered corporation.
  c. Any employee of the covered corporation who is also a director of the corporation.

(5) "Covered corporation" means a corporation that:
  a. Is incorporated under the laws of North Carolina and has substantial assets within North Carolina;
  b. Has a class of shares registered under Section 12 of the Securities Exchange Act of 1934;
  c. Has its principal place of business or principal office within North Carolina; and
  d. Has either:
    (i) More than ten percent (10%) of its shareholders resident in North Carolina; or
    (ii) More than ten percent (10%) of its shares owned by North Carolina residents.

(6) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(7) For purposes of calculating the percentages or numbers described in subsection (b)(5) of this section, any shares held in trust or by a nominee shall be deemed to be held by the beneficiaries of such trust or by the beneficiaries of such shares held by such nominee. (1987, c. 182, s. 1; 1989, c. 200, s. 1; c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.16.)

ARTICLE 10.

Amendment of Articles of Incorporation and Bylaws.

Part 1. Amendment of Articles of Incorporation.

§ 55-10-03. Amendment by board of directors and shareholders.

(a) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

(1) The board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the amendment; and

(2) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e).

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice of meeting must state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

(1) A majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters' rights; and

(2) The votes required by G.S. 55-7-25 and G.S. 55-7-26 by every other voting group entitled to vote on the amendment. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 8.)

§ 55-10-05. Amendment before issuance of shares.

If a corporation has not yet issued shares, the board of directors, or if the corporation has no directors, a majority of the incorporators may adopt one or more amendments to the corporation's articles of incorporation. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 9.)

§ 55-10-06. Articles of amendment.

A corporation amending its articles of incorporation shall deliver to the Secretary of State for filing articles of amendment setting forth:

(1) The name of the corporation;

(2) The text of each amendment adopted;

(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

(4) The date of each amendment's adoption;

(5) If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and a brief explanation of why shareholder action was not required;

(6) If an amendment was approved by the shareholders, a statement that shareholder approval was obtained as required by this Chapter. (1955, c. 1371, s. 1; 1959, c. 1316, s. 32; 1989, c. 265, s. 1; 1991, c. 645, s. 10(a).)

§ 55-10-07. Restated articles of incorporation.

(a) A corporation's board of directors may restate its articles of incorporation at any time with or without shareholder action.

(b) The restated articles of incorporation may include one or more amendments to the articles. If the restated articles of incorporation include an amendment requiring shareholder approval, it must be adopted as provided in G.S. 55-10-03. The restated articles of incorporation may include a statement of the address of the current registered office and the name of the current registered agent of the corporation, and no other.

(c) If the board of directors submits restated articles of incorporation for shareholder action, the corporation shall notify each shareholder entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must also (i) state that the purpose, or one of the purposes, of the meeting is to consider the proposed restated articles of incorporation, (ii) contain or be accompanied by a copy of the proposed restated articles of incorporation, and (iii) identify any amendment or other change they would make in the articles.

(d) A corporation restating its articles of incorporation shall deliver to the Secretary of State for filing articles of restatement which shall:

(1) Set forth the name of the corporation;

(2) Attach as an exhibit thereto the text of the restated articles of incorporation;

(3) State whether the restated articles of incorporation contain an amendment to the articles requiring shareholder approval and, if they do not, that the board of directors adopted the restated articles of incorporation; and

(4) If the restated articles of incorporation contain an amendment to the articles requiring shareholder approval, state that shareholder approval was obtained as required by this Chapter.

(e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(f) The Secretary of State may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the other information required by subsection (d). (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, ss. 11, 18.)

Part 2. Amendment of Bylaws.

§ 55-10-20. Amendment by board of directors or shareholders.

Legal Periodicals. — For article discussing shareholder voting rights, see 71 N.C.L. Rev. 1 (1992).

ARTICLE 11.

Merger and Share Exchange.

§ 55-11-03. Action on plan.

(a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger (except as provided in subsection (g)) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

(1) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the plan; and

(2) The shareholders entitled to vote must approve the plan.

(c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the plan of merger or share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group and, for the purpose of Article 9 or any provision in the articles of incorporation or bylaws adopted prior to July 1, 1990, a merger shall be deemed to include a share exchange.

(f) Separate voting by voting groups is required:

(1) On a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under G.S. 55-10-04, except where the consideration to be received in exchange for the shares of that group consists solely of cash;

(2) On a plan of share exchange by each class or series of shares to be acquired in the exchange, with each class or series constituting a separate voting group.

(g) Action by the shareholders of the surviving corporation on a plan of merger is not required if:

(1) The articles of incorporation of the surviving corporation will not differ (except for amendments enumerated in G.S. 55-10-02) from its articles before the merger;

(2) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same shares, with identical desig-

nations, preferences, limitations, and relative rights, immediately after the effective date of the merger;

(3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

(4) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of participating shares outstanding immediately before the merger.

(h) As used in subsection (g):

(1) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(2) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(i) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned (subject to any contractual rights), without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.17; 1993, c. 552, s. 14.)

AMENDED NORTH CAROLINA COMMENTARY

This section essentially follows the same pattern as former G.S. 55-108 and 55-108.1, except it does not carry forward the provision in former G.S. 55-108(b) allowing nonvoting shareholders to vote on mergers. However, the corporation must give nonvoting shareholders notice of the proposed shareholders' meeting so that they can act if their rights will be adversely affected. The Model Act's requirement that notice be given to nonvoting shareholders was retained in this section, in contrast to G.S. 55-10-03, involving shareholders' meetings to consider amendments to the articles of incorporation, because a proposed merger or share exchange is a fundamental change, whereas most amendments to the articles of incorporation are not. It should be noted that the last sentence in the first section of the Official Comment is not correct for this Act. That sentence indicates that nonvoting shareholders have no right to dissent and obtain payment for their shares in a merger or share exchange. G.S. 55-13-02(a)(1) and (2) give nonvoting shareholders this right.

The Model Act was modified in subsection (b) to conform to changes made in G.S. 55-10-03.

The Model Act was modified in subsection (e) by inserting between the word "incorporation" and the word "or" the words "a bylaw adopted by the shareholders." This modification continues the existing concept of allowing a bylaw adopted by the shareholders to impose a higher quorum or voting requirement. The subsection was further amended by inserting at the end a clause providing that for purposes of Article 9 or already existing provisions in articles of incorporation or bylaws, a "merger" includes a share exchange.

Subdivision 11.03(f)(1) of the Model

Act requires voting by voting groups on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation. This provision was modified in subdivision (f)(1) to create an exception where the consideration to be received in exchange for the shares of the voting group consists solely of cash.

The Model Act was modified in subdivision (f)(2) by substituting "to be acquired" for "included."

CASE NOTES

Failure to comply with the statutory procedures required for a corporate merger constitutes a breach of a director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority. Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 55-11-05. Articles of merger or share exchange.

(a) After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation shall deliver to the Secretary of State for filing articles of merger or share exchange setting forth:

(1) The plan of merger or share exchange;

(2) If shareholder approval was not required, a statement to that effect;

(3) If approval of the shareholders of one or more corporations party to the merger or share exchange was required, a statement that the merger or share exchange was approved by the shareholders as required by this Chapter.

(b) A merger or share exchange takes effect upon the effective date of the articles of merger or share exchange.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1967, c. 823, s. 18; 1973, c. 469, s. 34; 1989, c. 265, s. 1; 1991, c. 645, s. 10(b).)

§ 55-11-09. Merger with nonprofit corporation.

(a) One or more domestic or foreign nonprofit corporations may merge with one or more domestic corporations if:

(1) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03;

(2) In a merger involving one or more foreign nonprofit corporations, the merger is permitted by law of the state or country under whose law each foreign nonprofit corporation is incorporated and each foreign nonprofit corporation complies with that law in effecting the merger;

(3) The domestic or foreign nonprofit corporation complies with G.S. 55-11-05 if it is the surviving corporation; and

(4) Each domestic corporation complies with the applicable provisions of G.S. 55-11-01, 55-11-03, and 55-11-04 and, if it is the surviving corporation, with G.S. 55-11-05.

(b) Upon the merger taking effect, if the domestic or foreign nonprofit corporation is the surviving corporation, then it is deemed:

(1) To appoint the Secretary of State as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation party to the merger; and

(2) To agree that it will promptly pay to the dissenting shareholders of each domestic corporation party to the merger the amount, if any, to which they are entitled under Article 13 of this Chapter.

(c) This section does not limit the power of a domestic or foreign nonprofit corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise. (1995, c. 400, s. 13.)

Editor's Note. — Session Laws 1995, c. 400, s. 14, made this section effective October 1, 1995.

ARTICLE 13.

Dissenters' Rights.

Part 1. Right to Dissent and Obtain Payment for Shares.

§ 55-13-01. Definitions.

Legal Periodicals. — For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

§ 55-13-02. Right to dissent.

(a) In addition to any rights granted under Article 9, a shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

(1) Consummation of a plan of merger to which the corporation (other than a parent corporation in a merger under G.S. 55-11-04) is a party unless (i) approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or (ii) such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, unless such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than as permitted by G.S. 55-12-01, including a sale in dissolution, but not including a sale pursuant to court order or a sale pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of sale;

(4) An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it (i) alters or abolishes a preferential right of the shares; (ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares; (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities; (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes; (v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under G.S. 55-6-04; or (vi) changes the corporation into a nonprofit corporation or cooperative organization;

(5) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(b) A shareholder entitled to dissent and obtain payment for his shares under this Article may not challenge the corporate action creating his entitlement, including without limitation a merger solely or partly in exchange for cash or other property, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation. (1925, c. 77, s. 1; c. 235; 1929, c. 269; 1939, c. 279; 1943, c. 270; G.S., ss. 55-26, 55-167; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 30, 31; 1969, c. 751, ss. 36, 39; 1973, c. 469, ss. 36, 37; c. 476, s. 193; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.18; 1991, c. 645, s. 12.)

AMENDED NORTH CAROLINA COMMENTARY

Subdivisions (a)(1), (a)(2), and (a)(3) give a right of dissent for all shares, whether voting or nonvoting, in the case of a merger or sale or exchange of assets; the corresponding provisions in the Model Act give the right of dissent only to voting shareholders.

The right of dissent under this section, however, does not apply in a merger to shares of a corporation when approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or to shares of a parent corporation in a merger under G.S. 55-11-04. In addition, the right of dissent does not apply in a merger or share exchange to shares that are redeemable by the corporation at the time of the transaction at a price not greater than the cash to be received in exchange for such shares. The Model Act was modified in clause (i) of subdivision (a)(1) to clarify that the absence of a right of dissent applies only to the shares of the corporation covered by G.S. 55-11-03(g) and not to shares of a corporation if approval by its shareholders is required.

The Model Act was also modified in subdivision (a)(3) to provide that a right of dissent will not be available if the sale of property is pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of the sale. This is different from the Model Act, which requires the sale itself to be in cash. This subdivision thus allows more flexibility in permitting, for example, the sale to be for promissory notes or other property that will be converted to cash for distribution within the one-year period.

The language of the Model Act which excepts from the operation of the section "a limitation by dilution through issuance of shares or other securities with similar voting rights" was eliminated from the end of clause (iv) of subdivision (a)(4). The only reason for this elimination was the drafters' opinion that the language is unnecessary; if it were necessary, it should also have been added to the end of G.S. 55-10-04(a)(4).

Clause (vi) of subdivision (a)(4), which is not in the Model Act, brings forward the same provisions in former G.S. 55-101(b). However, the drafters decided not to bring forward the unusual provision in former G.S. 55-102(a) that gave a right of dissent to the holders of any class of preferred shares with dividend arrearages if the corporation offered to exchange such shares for shares with a prior preference and that offer was accepted by any of the preferred shareholders. Such a situation may be covered by clause (i) of subdivision (a)(4).

The introductory language of subsection 13.02(a) of the Model Act was modified to provide that the rights provided by this section are in addition to any rights provided by Article 9.

By making the appraisal remedy exclusive unless the transaction is "unlawful" or "fraudulent," subsection (b) effects a change from former G.S. 55-113(b), which provided that such remedy was "in addition to any other right [the shareholder] may have in law or in equity."

Language was added to the Model Act provision to make it clear that subsection (b) covers a cash merger and that, in determining whether a merger was "unlawful" or "fraudulent," the same standard applies, regardless of whether the consideration received was cash, other property, or shares of a surviving corporation.

Legal Periodicals. —

For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

CASE NOTES

A statutory appraisal is shareholder's exclusive remedy to redress what the minority shareholders perceived to be as an inadequate price for their shares. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

A statutory appraisal is not a dissenting shareholder's exclusive remedy when the shareholder has presented claims of breach of fiduciary duty, fraud, self-dealing, securities violations, or similar claims based on allegations other than solely the inadequacy of the stock price. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

When Statutory Appraisal is Appropriate Remedy. — A statutory appraisal is a dissenting shareholder's exclusive remedy when the shareholder challenges only the fair value or price of the stock. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

Exclusivity of Shareholder's Remedy. — Subsection (b) of this section now establishes the exclusivity of a dissenting shareholder's remedy in challenging a corporation's actions. The remedy is the exclusive remedy unless the transaction is unlawful or fraudulent. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

Plaintiffs in derivative shareholders' action were not required to pursue statutory dissenters' rights under former § 55-113 (see now Art. 13 of ch. 55) to oppose merger during litigation in order to maintain standing. Subdivision (c) of former § 55-113 would have deprived them of all interest in defendant corporation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Part 2. Procedure for Exercise of Dissenters' Rights.

§ 55-13-20. Notice of dissenters' rights.

Legal Periodicals. — For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

ARTICLE 14.

Dissolution.

Part 1. Voluntary Dissolution.

§ 55-14-01. Dissolution by incorporators or directors.

(a) The board of directors or, if the corporation has no directors, a majority of the incorporators of a corporation that has not issued shares may dissolve the corporation by delivering to the Secretary of State for filing articles of dissolution that set forth:

(1) The name of the corporation;
(1a) The names and addresses of its officers, if any;
(1b) The names and addresses of its directors, if any, or if none, the names and addresses of its incorporators;
(2) The date of its incorporation;
(3) That none of the corporation's shares has been issued;
(4) That no debt of the corporation remains unpaid;
(5) Reserved for future codification purposes; and
(6) That a majority of the incorporators or the board of directors authorized the dissolution.

(b) A corporation is dissolved upon the effective date of its articles of dissolution. (1955, c. 1371, s. 1; 1959, c. 1316, s. 26½; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.19.)

AMENDED NORTH CAROLINA COMMENTARY

This section modifies the Model Act in that dissolution by the directors or incorporators is authorized only in the case of a corporation that has not issued shares. In addition, the incorporators are authorized to act only if the corporation has no directors, and the articles of dissolution must identify the officers and directors or, if none, the incorporators.

Subsection (b) was added for clarification; it parallels G.S. 55-14-03(b).

§ 55-14-03. Articles of dissolution.

(a) At any time after dissolution is authorized pursuant to G.S. 55-14-02, the corporation may dissolve by delivering to the Secretary of State for filing articles of dissolution setting forth:

(1) The name of the corporation;
(1a) The names and addresses of its officers;
(1b) The names and addresses of its directors;
(2) The date dissolution was authorized;
(3) A statement that shareholder approval was obtained as required by this Chapter.
(4) Repealed by Session Laws 1991, c. 645, s. 10(c), effective October 1, 1991.

(b) A corporation is dissolved upon the effective date of its articles of dissolution. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, s. 10(c).)

CASE NOTES

Cited in Storr Office Supply Div. v. Radar Bus. Sys., 832 F. Supp. 154 (E.D.N.C. 1993).

§ 55-14-05. Effect of dissolution.

CASE NOTES

Dissolution does not terminate the corporation's existence nor its amenability to suit. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

Acquisition of New Property Not Incident to Winding Up. — While former § 55-114(b) provided that a dissolved corporation continued to function for the limited purpose of winding up its affairs, the acquisition of new property was not incident to the winding up process. Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., 96 N.C. App. 105, 384 S.E.2d 687 (1989), motion to amend petition for discretionary review granted, 326 N.C. 49, 389 S.E.2d 93 (1990).

Certificate of Completed Liquidation Not Required. — Unlike prior law, a dissolved corporation is not required to file a certificate of completed liquidation. State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Company's failure to file a certificate of completed liquidation or to send or publish notice of dissolution, did not trigger the two-year "survival" period nor did its corporate existence cease; thus, the company was an existing entity to which the current North Carolina Business Corporation Act applied. State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Applied in Storr Office Supply Div. v. Radar Bus. Sys., 832 F. Supp. 154 (E.D.N.C. 1993).

Cited in Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

§ 55-14-06. Known claims against dissolved corporation.

CASE NOTES

Cited in Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993); State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

§ 55-14-07. Unknown and certain other claims against dissolved corporation.

CASE NOTES

Cited in State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

§ 55-14-08. Enforcement of claims.

CASE NOTES

Enforcement Under Subdivision (a)(2). — If the corporation does not avail itself of protection against claims, a claim may be enforced under subdivision (a)(2); this enforcement provision makes a shareholder liable regardless of whether the distribution was made at a time when the corporation was unable to meet its obligations and regardless of whether shareholder knew that the distribution violated this Act. State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Because shareholder distributee liability contemplates a monetary claim, as it provides for enforcement to the extent of assets received in liquidation, this form of enforcement is not possible when the claim is for injunctive relief; because an order to abate a nuisance is a form of injunctive relief, shareholder distributee liability is not an appropriate basis upon which to order president of company to abate the nuisance. State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Part 2. Administrative Dissolution.

§ 55-14-20. Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(2) The corporation does not deliver its annual report to the Secretary of State within 60 days after it is due;

(3) The corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;

(5) The corporation's period of duration stated in its articles of incorporation expires; or

(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter. (1989, c. 265, s. 1; 1993, c. 552, s. 15.)

§ 55-14-22. Reinstatement following administrative dissolution.

(a) **(Effective until July 1, 1996)** A corporation administratively dissolved under G.S. 55-14- 21 may apply to the Secretary of State for reinstatement after the effective date of dissolution. The application must:

(1) Recite the name of the corporation and the effective date of its administrative dissolution; and

(2) State that the ground or grounds for dissolution either did not exist or have been eliminated.

(3) Reserved.

(4) Repealed by Session Laws 1995, c. 539, s. 6, effective July 29, 1995.

(a) **(Effective July 1, 1996)** A corporation administratively dissolved under G.S. 55-14-21 may apply to the Secretary of State for reinstatement within two years after the effective date of dissolution. The application must:

(1) Recite the name of the corporation and the effective date of its administrative dissolution; and

(2) State that the ground or grounds for dissolution either did not exist or have been eliminated.

§ 55-14-22(a) is set out twice. See notes.

(3) Reserved.

(4) Repealed by Session Laws 1995, c. 539, s. 6, effective July 29, 1995.

(b) If the Secretary of State determines that the application contains the information required by subsection (a) and that the information is correct, he shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites his determination and the effective date of reinstatement, file the original of the certificate, and mail a copy to the corporation.

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred, subject to the rights of any person who reasonably relied to his prejudice upon the certificate of dissolution. (1989, c. 265, s. 1; 1995, c. 539, ss. 6, 7.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 1996. The second version of subsection (a) set out above is effective July 1, 1996.

Effect of Amendments. — Session Laws 1995, c. 539, s. 6, applicable to applications for reinstatement filed on or after the date of ratification (July 29, 1995), deleted "within two years" following "reinstatement" in the introductory language of subsection (a); deleted subdivision (a)(3), which was reserved, and subdivision (a)(4), regarding a certificate reciting that taxes had been paid; and made stylistic and related changes.

Session Laws 1995, c. 539, s. 7, effective July 1, 1996, and applicable to applications for reinstatement on or after that date, inserted "within two years" following "reinstatement" in the introductory language of subsection (a).

Part 3. Judicial Dissolution.

§ 55-14-30. Grounds for judicial dissolution.

Legal Periodicals. — For note, "Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act," see 68 N.C.L. Rev. 1109 (1990).

CASE NOTES

Deadlock in Management of Corporate Affairs. — Where plaintiff and defendant were the only directors, because they could not agree when the corporation should borrow money, the corporation could not borrow money at all; therefore, there was sufficient evidence to support a finding of deadlock in the management of the corporation's affairs. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

Mandatory Buy-Out Rights. — Mandatory buy-out rights under subsection (d) of § 55-14-30 apply only to dissolutions granted under subdivision (2)(ii) of this section. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

Insufficient Grounds for Dissolution. — Where the trial court failed to make any of the findings required under Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983), but simply found that liquidation was reasonably necessary for the protection of the interests of the complaining shareholder, the trial court's findings of fact were not sufficient to support its conclusion that grounds for dissolution existed. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

Applied in Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834 (1993).

Quoted in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 55-14-31. Procedure for judicial dissolution.

Legal Periodicals. — For note, "Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act," see 68 N.C.L. Rev. 1109 (1990).

CASE NOTES

Mandatory buy-out rights under subsection (d) of this section apply only to dissolutions granted under subdivision (2)(ii) of § 55-14-30. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

§ 55-14-33. Decree of dissolution.

CASE NOTES

Trial court was not required to hold hearing on valuation of the corporation's stocks and assets prior to entering its dissolution order as any specific problems regarding implementation of the dissolution order, including valuation of the corporation's assets, can be brought to the attention of the trial court by motion as the problems arise. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

ARTICLE 15.

Foreign Corporations.

Part 1. Certificate of Authority.

§ 55-15-01. Authority to transact business required.

(a) A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State.

(b) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State solely for the purposes of this Chapter, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Transacting business in interstate commerce;

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;

(10) Selling through independent contractors;

(11) Owning, without more, real or personal property.

(c) Reserved for future codification purposes.

(d) Foreign insurance companies that are licensed by the Commissioner of Insurance are not required to obtain a certificate of authority from the Secretary of State. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.20; 1993, c. 552, s. 16.)

AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) by adding the words "under this Chapter or under Chapter 55A of the General Statutes."

The activities listed in the Model Act as not constituting the transaction of business appear to be narrower in certain respects than the activities listed in former G.S. 55-131(b). Subsection (b), which applies solely for purposes of this Act and not for purposes of determining whether there is *in personam* jurisdiction over a foreign corporation, brings forward former G.S. 55-131(b) with the addition of subdivisions 15.01(b)(5) and (9) from the Model Act as subdivisions (b)(10) and (11). The substitution rendered the Model Act's text in subsection 15.01(c) unnecessary, and it was omitted.

Subsection (d) was added to bring forward the provisions of former G.S. 55-131(c) in a revised, clarified version.

§ 55-15-02. Consequences of transacting business without authority.

CASE NOTES

Failure to Raise Issue in Pre-Trial Motion. — Where the evidence showed that defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by subsection (a), precluded it from doing so in a motion after trial. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

§ 55-15-03. Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in this State by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this State, a corporate name that satisfies the requirements of G.S. 55-15-06;
(2) The name of the state or country under whose law it is incorporated;
(3) Its date of incorporation and period of duration;
(4) The street address, and the mailing address if different from the street address, of its principal office;
(5) The street address, and the mailing address if different from the street address, of its registered office in this State, the county in which the registered office is located, and the name of its registered agent at that office; and
(6) The names and usual business addresses of its current officers.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated.

(c) If the Secretary of State finds that the application conforms to law he shall, when all fees have been tendered as prescribed in this Chapter:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed" and the hour, day, month, and year of the filing thereof;
(2) File in his office the application and the certificate of existence (or document of similar import as described in subsection (b) of this section);
(3) Issue a certificate of authority to transact business in this State to which he shall affix the exact or conformed copy of the application; and
(4) Send to the foreign corporation or its representative the certificate of authority, together with the exact or conformed copy of the application affixed thereto. (1901, c. 2, s. 57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C.S., s. 1181; 1935, c. 44; 1939, c. 57; G.S., s. 55-118; 1953, c. 1152; 1955, c. 1371, s. 1; 1957, c. 979, s. 8; 1969, c. 751, s. 41; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, ss. 12.1(b), 12.21.)

AMENDED NORTH CAROLINA COMMENTARY

This Act does not bring forward the requirement of former G.S. 55-138(a) that a foreign corporation include in its application the purposes it desires to pursue in this State and information with respect to its capital structure. In addition, the application under this Act is submitted with a certificate of existence or good standing rather than the certified charter documents required under former G.S. 55-138.

Subsection (a) was modified to conform to changes from the Model Act in the address requirement made in G.S. 55-2-02 and G.S. 55-5-02.

Subsection (c) brings forward former G.S. 55-139(b) because the Model Act contains no express requirement that the Secretary of State issue a certificate of authority.

§ 55-15-04. Amended certificate of authority.

(a) A foreign corporation authorized to transact business in this State must obtain an amended certificate of authority from the Secretary of State if it changes:

(1) Its corporate name;

(2) The period of its duration; or
(3) The state or country of its incorporation.

(b) A foreign corporation may apply for an amended certificate of authority by delivering an application to the Secretary of State for filing that sets forth:

(1) The name of the foreign corporation and the name in which the corporation is authorized to transact business in North Carolina if different;
(2) The name of the state or country under whose law it is incorporated;
(3) The date it was originally authorized to transact business in this State;
(4) A statement of the change or changes being made.

Except for the content of the application, the requirements of G.S. 55-15-03 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.22.)

§ 55-15-05. Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this State subject, however, to the right of the State to revoke the certificate as provided in this Chapter. A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death, except that a foreign corporation chartered under the banking laws of Georgia, South Carolina, Tennessee or Virginia or as a national banking association in any said states may act as testamentary trustee, or executor in this State if:

(1) It has a bona fide capital of at least two hundred and fifty thousand dollars ($250,000) actually paid in;
(2) It is authorized to act in such fiduciary capacity in the state in which it is incorporated or if such foreign corporation be a national banking association in the state in which it has its principal place of business; and
(3) Any bank or other corporation organized under the laws of this State or a national banking association having its principal place of business in this State is permitted by law to act in such fiduciary capacity in the state in which such foreign corporation seeking to act in this State is organized or in which it has its principal place of business if it is a national banking association without further showing or qualification other than that it is authorized to act in such fiduciary capacity in this State and upon compliance with the laws of such other state, if any, concerning service of process on nonresident fiduciaries.

Unless assets of the estate are to be removed from within the State of North Carolina, such foreign corporations seeking to act as testamentary trustee, or executor in this State, upon qualifying to act in such fiduciary capacity, shall not be required by law to give bond except as required of a resident corporate fiduciary in like circumstances. No officer, employee or agent of any such foreign corporation shall be eligible or entitled to serve as testamentary trustee, or executor in this State whether such officer, employee, or agent is a resident or nonresident of this State if such officer, employee or agent is acting as testamentary trustee or executor on behalf of any such foreign corporation except when such foreign corporation itself shall be eligible to so serve.

A foreign corporation qualifying as testamentary trustee or executor under the provisions of this section shall appoint a process agent and file such appointment with the court as required by G.S. 28A-4-2(4).

(b) Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) Reserved for future codification purposes. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1969, c. 839; 1985, c. 689, s. 25; 1989, c. 265, s. 1.)

Editor's Note. — The section above is set out to correct a typographical error in the second sentence of subsection (a).

§ 55-15-06. Corporate name of foreign corporation.

Editor's Note. — The phrase "changed named" in subsection (e) of this section as it appears in the main volume should read "changed name."

§ 55-15-08. Change of registered office or registered agent of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

(1) Its name;

(2) The street address, and the mailing address if different from the street address, of the corporation's current registered office, and the county in which it is located;

(3) If the address of the corporation's registered office is to be changed, the street address, and the mailing address if different from the street address, of the new registered office, and the county in which it is located;

(4) The name of its current registered agent;

(5) If the current registered agent is to be changed, the name of its new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) That after the change or changes are made, the addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the address of his business office, he may change the address of the registered office of any foreign corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement of change that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

(c) A foreign corporation authorized to transact business in this State may change its registered office or registered agent by including in its annual report required by G.S. 55-16-22 the information and any written consent required by subsection (a) of this section. (1955, c. 1371, s. 1; 1957, c. 979, ss. 9, 10; 1965, c. 298, s. 2; 1989, c. 265, s. 1; 1993, c. 552, s. 17.)

Part 2. Withdrawal.

§ 55-15-20. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to transact business in this State may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not transacting business in this State and that it surrenders its authority to transact business in this State;

(3) That the corporation revokes the authority of its registered agent to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State;

(4) A mailing address to which the Secretary of State may mail a copy of any process served on him under subdivision (3); and

(5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(b1) If the Secretary of State finds that such application conforms to law, he shall:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed", and the hour, day, month and year of the filing thereof;

(2) File the application in his office;

(3) Issue a certificate of withdrawal to which he shall affix the exact or conformed copy of the application; and

(4) Send to the foreign corporation or its representative the certificate of withdrawal together with the exact or conformed copy of the application affixed thereto.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State in accordance with subsection (b)(3) of this section is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the foreign corporation at the mailing address set forth under subsection (b). (1955, c. 1371, s. 1; 1973, c. 476, s. 193; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.23.)

AMENDED NORTH CAROLINA COMMENTARY

This section modifies the Model Act in subdivision (b)(3) to clarify and limit the circumstances under which service of process on the Secretary of State is effective with respect to a foreign corporation that has withdrawn from this State. In addition, former G.S. 55-150(d), modified to conform to G.S. 55-15-03(c), was added as subsection (b1), because the Model Act contains no express requirement that the Secretary of State issue a certificate of withdrawal or send the certificate to the foreign corporation or its representative.

§ 55-15-21. Withdrawal of foreign corporation by reason of a merger.

(a) Whenever the separate existence of a foreign corporation authorized to transact business in this State ceases as a result of a statutory merger permitted by the laws of the state or country under which it was incorporated, the surviving corporation shall apply for a certificate of withdrawal for the merged corporation by delivering to the Secretary of State for filing a copy of the articles of merger or a certificate reciting the facts of the merger, duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under the laws of which such statutory merger was effected. If the surviving corporation is not authorized to transact business in this State the articles of merger or certificate must be accompanied by an application which must set forth:

(1) The name of each merged corporation authorized to transact business in this State and the name of the surviving corporation and a statement that the surviving corporation is not authorized to transact business in this State;

(2) That the surviving corporation consents that service of process based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time each merged corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State;

(3) A mailing address to which the Secretary of State may mail a copy of any process served on him under subdivision (a)(2); and

(4) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(b) If the Secretary of State finds that the articles of merger or certificate and the application for withdrawal, if required, conforms to law he shall:

(1) Endorse on the articles of merger or certificate and the application for withdrawal, if required, the word "filed" and the hour, day, month and year of filing thereof;

(2) File the articles of merger or certificate and the application, if required;

(3) Issue a certificate of withdrawal; and

(4) Send to the foreign corporation or its representative the certificate of withdrawal, together with the exact or conformed copy of the application, if required, affixed thereto. (1991, c. 645, s. 13.)

Editor's Note. — Session Laws 1991, c. 645, s. 22 made this section effective October 1, 1991.

§§ 55-15-22 through 55-15-29: Reserved for future codification purposes.

Part 3. Revocation of Certificate of Authority.

§ 55-15-30. Grounds for revocation.

(a) The Secretary of State may commence a proceeding under G.S. 55-15-31 to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if:

(1) The foreign corporation does not deliver its annual report to the Secretary of State within 60 days after it is due;

(2) The foreign corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(3) The foreign corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The foreign corporation does not inform the Secretary of State under G.S. 55-15-08 or G.S. 55-15-09 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) An incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger;

(7) The corporation is exceeding the authority conferred upon it by this Chapter; or

(8) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter.

(b) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 18.)

§ 55-15-31. Procedure for and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55-15-30 for revocation of a certificate of authority, he shall mail to the foreign corporation written notice of his determination.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the foreign corporation.

(c) The authority of a foreign corporation to transact business in this State ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action arising in this State or arising out of business transacted in this State during the time the foreign corporation was authorized to transact business in this State. The Secretary of State shall then proceed in accordance with G.S. 55-15-10.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

(f) The corporation shall not be granted a new certificate of authority until each ground for revocation has been substantially corrected to the reasonable satisfaction of the Secretary of State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.24; 1991, c. 645, s. 14.)

§ 55-15-32. Appeal from revocation.

(a) A foreign corporation may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Wake County within 30 days after the certificate of revocation is mailed to the foreign corporation by the Secretary of State. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to set aside the revocation. The petition shall have attached to it copies of the corporation's certificate of authority and the Secretary of State's certificate of revocation. The appeal to the superior court shall be determined upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances. The foreign corporation shall have the burden of establishing that it is entitled to have the revocation set aside.

(b) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to set aside the revocation or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.25.)

ARTICLE 16.

Records and Reports.

Part 1. Records.

§ 55-16-01. Corporate records.

CASE NOTES

Stated in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992).

§ 55-16-02. Inspection of records by shareholders.

(a) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in G.S. 55-16-01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

(b) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

(1) Records of any final action taken with or without a meeting by the board of directors, or by a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders without a meeting, to the extent not subject to inspection under G.S. 55-16-02(a);
(2) Accounting records of the corporation; and
(3) The record of shareholders;

provided that a shareholder of a public corporation shall not be entitled to inspect or copy any accounting records of the corporation or any records of the corporation with respect to any matter which the corporation determines in good faith may, if disclosed, adversely affect the corporation in the conduct of its business or may constitute material nonpublic information at the time the shareholder's notice of demand to inspect and copy is received by the corporation.

(c) A qualified shareholder may inspect and copy the records described in subsection (b) only if:

(1) His demand is made in good faith and for a proper purpose;
(2) He describes with reasonable particularity his purpose and the records he desires to inspect; and
(3) The records are directly connected with his purpose.

(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(e) This section does not affect:

(1) The right of a shareholder to inspect records under G.S. 55-7-20 or, if the shareholder is in litigation with the corporation, to inspect the records to the same extent as any other litigant;

(2) The power of a court, independently of this Chapter, to compel the production of corporate records for examination.

(f) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf and whose beneficial ownership is certified to the corporation by that voting trust or nominee.

(g) For purposes of this section a "qualified shareholder" of a corporation is a person who shall have been a shareholder in the corporation for at least six months immediately preceding his demand or who shall be the holder of at least five percent (5%) of the corporation's outstanding shares of any class.

(h) A qualified shareholder of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation or of a domestic or foreign nonprofit corporation, shall have the inspection rights provided in this section with respect to the records of that other corporation.

(i) Notwithstanding the provisions of this section or any other provisions of this Chapter or interpretations thereof to the contrary, a shareholder of a public corporation shall have no common law rights to inspect or copy any accounting records of the corporation or any other records of the corporation that may not be inspected or copied by a shareholder of a public corporation as provided in G.S. 55-16-02(b). (1901, c. 2, ss. 38, 45, 49; Rev., ss. 1179-1181; C.S., ss. 1170, 1172; G.S., ss. 55-107, 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.26; 1993, c. 552, s. 19.)

CASE NOTES

Considerations. — To determine whether a shareholder's demand to inspect corporate records meets the requirements of subsection (c) of this section, the trial court must focus upon the demand itself, not upon the shareholder's subsequent pleadings or motions filed in an attempt to compel inspection under G.S. § 55-16-04(b). Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

A beneficial owner of shares is a "shareholder" within the meaning of subdivision (b)(3) when the corporation has obtained a NOBO (non-objecting beneficial owners) list pursuant to 17 C.F.R. § 240.14b-1(c) listing that owner, or when there is a nominee certificate regarding that owner on file with the corporation. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

Non-objecting beneficial owners who had not filed nominee certificates were not "shareholders" within the meaning of subdivision (b)(3) of this section, and corporation did not have an obligation to obtain and make available to shareholder a list of their names. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

Proper Purpose. — Where shareholder demanded to inspect corporate records to determine "any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company," shareholder's stated purpose was proper under subdivision (c)(1) of this section. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

Part 2. Reports.

§ 55-16-20. Financial statements for shareholders.

CASE NOTES

Cited in McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

§ 55-16-22. Annual report for Secretary of State.

(a) Each domestic corporation except those governed by Chapter 55B, and each foreign corporation authorized to transact business in this State, shall deliver to the Secretary of State for filing an annual report that sets forth:

(1) The name of the corporation and the state or country under whose law it is incorporated;
(2) The street address, and the mailing address if different from the street address, of the registered office, the county in which its registered office is located, and the name of its registered agent at that office in this State, and a statement of any change of such registered office or registered agent, or both;
(3) The address of its principal office;
(4) The names, titles, and business addresses of its principal officers;
(4a) The names and business addresses of its directors; and
(5) A brief description of the nature of its business.

(b) Information in the annual report must be current as of the date the annual report is executed on behalf of the corporation.

(c) The annual report shall be delivered to the Secretary of State each year within 60 days immediately following the last day of the month in which the domestic corporation was incorporated or the foreign corporation received a certificate of authority in this State. Forms required for the filing of the annual report shall be mailed by the Secretary of State to the domestic or foreign corporation at its registered office for the first annual report, then to its principal office for subsequent annual reports.

(d) If an annual report does not contain the information required by this section, the Secretary of State shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed.

(e) Amendments to any previously filed annual report may be filed at any time for the purpose of correcting, updating, or augmenting the information contained in such annual report.

(f) Expired. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1066, s. 32(a); 1993, c. 218, s. 2.)

Editor's Note. — Session Laws 1989, c. 265, s. 3, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 32(a), made this section effective January 1, 1991.

Subsection (f) of this section, concerning filing of the annual report before or after administrative dissolution or revocation of certificate of authority, has not been set out, as having expired July 1, 1994, pursuant to the terms of Session Laws 1993, c. 218, s. 2.

Session Laws 1993 (Reg. Sess., 1994), c. 769, in s. 9.2, provides that the Legislative Research Commission may study whether the requirement under G.S. 55-16-22 that a corporation file an annual report with the Secretary of State should be modified, and appropriates the sum of $25,000 to conduct the study.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

ARTICLE 17.

Transition and Curative Provisions.

§ 55-17-01. Applicability of act.

CASE NOTES

Pre-existing Corporations. — The current North Carolina Business Corporation Act applies to corporations existing prior to its enactment. State ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

§ 55-17-03. Saving provisions.

(a) The existence of corporations formed before July 1, 1990, shall not be impaired by the enactment of this Chapter nor by any change made by this Chapter in the requirements for the formation of corporations nor by any amendment or repeal by this Chapter of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

(b) Any proceeding or corporate action commenced before July 1, 1990, may be completed in accordance with the law then in effect.

(c) A corporation dissolved by operation of law before July 1, 1990, may wind up and liquidate its business and affairs pursuant to the provisions of Article 14 of this Chapter. (1955, c. 1371, s. 1; 1957, c. 550, s. 1; 1973, c. 469, s. 1; 1989, c. 265, s. 1; 1993, c. 218, s. 1.)

CASE NOTES

Applied in Barclays Leasing, Inc. v. National Bus. Sys., 750 F. Supp. 184 (W.D.N.C. 1990).

Cited in United States v. Vanguard Inv. Co., 6 F.3d 222 (4th Cir. 1993).

§ 55-17-05. Curative statute.

All deeds, conveyances and other instruments executed prior to the effective date of this Chapter and validated by the curative provisions of former G.S. 55-36.1 and former Article 12 of Chapter 55 as they were immediately prior to such effective date shall be valid and effective to the same extent as if those provisions had not been amended or repealed. The provisions of former G.S. 55-36 shall continue to apply to all instruments executed before July 1, 1990, to which that section applied. (1905, c. 316; Rev., s. 1248; 1939, c. 23; 1941, c. 294; 1943, c. 219, s. 1½; 1947, c. 504, ss. 1, 2; 1949, c. 436; c. 825; 1951, c. 395; C.S., s. 1134; G.S., ss. 55-35, 55-41, 55-41.1, 55-41.2, 55-42, 55-164.1, 55-164.2; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1969, c. 953, s. 1; 1971, c. 60; 1977, c. 40, s. 1; 1979, c. 364; 1989, c. 265, s. 1; 1991, c. 647, s. 1.)

Effect of Amendments. — The 1991 amendment, effective July 1, 1990, but inapplicable to any action or proceeding filed on or after July 1, 1990, and before the ratification of the 1991 amendment [July 12, 1991], added the second sentence.

TABLES OF COMPARABLE SECTIONS FOR CHAPTER 55

Former to Present

Editor's Note. — The headings of the columns of the Former to Present Table appearing on page 330 of the main volume have been inadvertently reversed. The first, third and fifth columns on that page should read "Former Section" and the second, fourth and sixth columns should read "Present Section."

Chapter 55A.

North Carolina Nonprofit Corporation Act.

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55A-1-21. Forms.
55A-1-22. Filing, service, and copying fees.
55A-1-22.1. Expedited filings.
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55A-1-28. Certificate of existence.
55A-1-29. Penalty for signing false document.

Part 3. Secretary of State.

55A-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

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55A-1-40. Chapter definitions.
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55A-5-01. Registered office and registered agent.
55A-5-02. Change of registered office or registered agent.
55A-5-02.1. Principal office address.
55A-5-03. Resignation of registered agent.
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Members' Meetings and Voting; Derivative Proceedings.

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55A-7-21. Voting entitlement generally.
55A-7-23. Voting requirements.

Sec.
55A-7-27. Corporation's acceptance of votes.

Article 8.

Directors and Officers.

Part 1. Board of Directors.

55A-8-05. Terms of directors generally.

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55A-8-23. Waiver of notice.

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Part 1. Amendment of Articles of Incorporation.

55A-10-03. Amendment by directors and members.

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55A-10-30. Approval by third persons.

Article 11.

Merger.

55A-11-01. Approval of plan of merger.
55A-11-02. Limitations on mergers by charitable or religious corporations.
55A-11-06. Merger with foreign corporation.
55A-11-08. Merger with business corporation.

Article 14.

Dissolution.

Part 2. Administrative Dissolution.

55A-14-20. (Effective until July 1, 1996) Grounds for administrative dissolution.
55A-14-20. (Effective July 1, 1996) Grounds for administrative dissolution.

Article 15.

Foreign Corporations.

Part 1. Certificate of Authority.

55A-15-09. Resignation of registered agent of foreign corporation.

Sec.
55A-15-10. Service on foreign corporation.

Part 2. Withdrawal.

55A-15-20. Withdrawal of foreign corporation.

Part 3. Revocation of Certificate of Authority.

55A-15-30. Grounds for revocation.
55A-15-31. Procedure and effect of revocation.
55A-15-33. Inapplicability of Administrative Procedure Act.

Article 16.

Records and Reports.

Part 1. Records.

Sec.
55A-16-01. Corporate records.
55A-16-05. Limitations on use of membership list.
55A-16-22. [Repealed.]

Article 17.

Transition and Curative Provisions.

55A-17-01. Applicability of Chapter.

ARTICLE 1.

General Provisions.

Part 2. Filing Documents.

§ 55A-1-21. Forms.

(a) The Secretary of State may promulgate and furnish on request forms for:

(1) An application for a certificate of existence;
(2) A foreign corporation's application for a certificate of authority to conduct affairs in this State;
(3) A foreign corporation's application for a certificate of withdrawal;
(4) Designation of Principal Office Address; and
(5) Corporation's Statement of Change of Principal Office.

If the Secretary of State so requires, use of these forms is mandatory.

(b) The Secretary of State may promulgate and furnish on request forms for other documents required or permitted to be filed by this Chapter but their use is not mandatory. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 539, s. 9.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, rewrote subdivision (a)(4), which formerly read "The annual report", added subdivision (a)(5), and made a related change.

§ 55A-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary for filing:

	Document	Fee
(1)	Articles of incorporation	$50.00
(2)	Application for reserved name	$10.00
(3)	Notice of transfer of reserved name	$10.00
(4)	Application for registered name	$10.00
(5)	Application for renewal of registered name	$10.00

	Document	Fee
(6)	Corporation's statement of change of registered agent or registered office of both	$ 5.00
(7)	Agent's statement of change of registered office for each affected corporation	$ 5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	$ 5.00
(10)	Amendment of articles of incorporation	$25.00
(11)	Restated articles of incorporation without amendment of articles	$10.00
(12)	Restated articles of incorporation with amendment of articles	$25.00
(13)	Articles of merger	$25.00
(14)	Articles of dissolution	$15.00
(15)	Articles of revocation of dissolution	$10.00
(16)	Certificate of administrative dissolution	No fee
(17)	Application for reinstatement following administrative dissolution	$25.00
(18)	Certificate of reinstatement	No fee
(19)	Certificate of judicial dissolution	No fee
(20)	Application for certificate of authority	$100.00
(21)	Application for amended certificate of authority	$25.00
(22)	Application for certificate of withdrawal	$10.00
(23)	Certificate of revocation of authority to conduct affairs	No fee
(24)	Corporation's Statement of Change of Principal Office	$5.00
(24a)	Designation of Principal Office Address	$5.00
(25)	Articles of correction	$10.00
(26)	Application for certificate of existence or authorization	$ 5.00
(27)	Any other document required or permitted to be filed by this Chapter	$10.00.

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original; and

(2) Five dollars ($5.00) for the certificate. (1957, c. 1179; 1967, c. 823, s. 24; 1969, c. 875, s. 10; 1975, 2nd Sess., c. 981, s. 2; 1983, c. 713, ss. 39-42; 1991, c. 574, s. 2; 1993, c. 398, s. 1; 1995, c. 539, s. 10.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, rewrote subdivision (a)(24), which formerly read "Annual Report" and "$5.00"; and added subdivision (a)(24a).

§ 55A-1-22.1. Expedited filings.

The Secretary of State shall guarantee the expedited filing of a document upon receipt of the document in proper form and the payment of the required filing fee. The Secretary of State may collect the following additional fees for the expedited filing of a document received in good form:

(1) Two hundred dollars ($200.00) for the filing by the end of the same business day of a document received by 12:00 noon Eastern Standard Time; and

(2) One hundred dollars ($100.00) for the filing of a document within 24 hours after receipt, excluding weekends and holidays.

The Secretary of State shall not collect the fees allowed in this section unless the person submitting the document for filing requests an expedited filing and is informed by the Secretary of State of the fees prior to the filing of the document. (1995, c. 539, s. 11.)

Editor's Note. — Session Laws 1995, c. 539, s. 38(c) made this section effective July 29, 1995, and applicable to expedited filings submitted on or after that date.

§ 55A-1-25. Filing duty of Secretary of State.

(a) If a document delivered to the office of the Secretary of State for filing satisfies the requirements of this Chapter, the Secretary of State shall file it. Documents filed with the Secretary of State pursuant to this Chapter may be maintained by the Secretary either in their original form or in photographic, microfilm, optical disk media, or other reproduced form. The Secretary may make reproductions of documents filed under this Chapter, or under any predecessor act, by photographic, microfilm, optical disk media, or other means of reproduction, and may destroy the originals of those documents reproduced.

(b) The Secretary of State files a document by stamping or otherwise endorsing "Filed", together with the Secretary of State's name and official title and the date and time of filing, on both the original and the exact or conformed copy. After filing a document, except as provided in G.S. 55A-5-03 and G.S. 55A-15-09, the Secretary of State shall deliver the exact or conformed copy to the domestic or foreign corporation or its representative.

(c) If the Secretary of State refuses to file a document, the Secretary of State shall return it, by personal delivery or by first-class mail postage prepaid, to the domestic or foreign corporation or its representative within five days after the document was received, together with a brief, written statement of the date of and the reason for refusal. The Secretary of State may correct apparent errors and omissions on a document submitted for filing if authorized to make the corrections by the person submitting the document for filing. The authorization to make the corrections shall be confirmed, according to procedures adopted by rule, by the Secretary prior to making the correction.

(d) The Secretary of State's duty is to review and file documents that satisfy the requirements of this Chapter. The Secretary of State's filing or refusing to file a document does not:

(1) Except as provided in G.S. 55A-2-03(b), affect the validity or invalidity of the document in whole or part;

(2) Determine the correctness or incorrectness of information contained in the document;

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (1955, c. 1230; 1967, c. 13, s. 2; c. 823, s. 21; 1985 (Reg. Sess., 1986), c. 801, s. 2; 1993, c. 398, s. 1; 1995, c. 539, s. 12.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, added the second and third sentences in subsections (a) and (c).

§ 55A-1-27. Evidentiary effect of certificate of filing.

A certificate attached to a copy of a document filed by the Secretary of State, bearing the Secretary of State's signature (which may be in facsimile) and the seal of office and certifying that the copy is a true copy of the document, is conclusive evidence that the original document is on file with the Secretary of State. A photographic, microfilm, optical disk media, or other reproduced copy of a document filed pursuant to this Chapter or any predecessor act, when certified by the Secretary, shall be considered an original for all purposes and is admissible in evidence in like manner as an original. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 539, s. 13.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the last sentence and made a stylistic change.

§ 55A-1-28. Certificate of existence.

(a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's name used in this State;

(2) That the domestic corporation is duly incorporated under the law of this State, the date of its incorporation, and the period of its duration if less than perpetual; or that the foreign corporation is authorized to conduct affairs in this State;

(3) That the articles of incorporation of a domestic corporation or the certificate of authority of a foreign corporation has not been suspended for failure to comply with the Revenue Act of this State and that the corporation has not been administratively dissolved for failure to comply with the provisions of this Chapter;

(4) Repealed by Session Laws c. 539, s. 14, effective July 29, 1995.

(5) That articles of dissolution have not been filed; and

(6) Other facts of record in the office of the Secretary of State that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to conduct affairs in this State. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 539, s. 14.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, repealed subdivision (b)(4) regarding an annual report.

§ 55A-1-29. Penalty for signing false document.

(a) A person commits an offense if the person signs a document the person knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing.

(b) An offense under this section is a Class 1 misdemeanor. (1955, c. 1230; 1993, c. 398, s. 1; 1994, Ex. Sess., c. 14, s. 36.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

Part 3. Secretary of State.

§ 55A-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

(a) The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully, within the time prescribed in this Chapter, interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter shall constitute grounds for administrative dissolution under G.S. 55A-14-20 or for revocation under G.S. 55A-15-30, as the case may be.

(b) Each officer and director of a domestic or foreign corporation who knowingly fails or refuses, within the time prescribed by this Chapter, to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1955, c. 1230; 1993, c. 398, s. 1; 1994, Ex. Sess., c. 14, s. 37.)

Editor's Note. — Session Laws 1993, c. 539, s. 441 would have amended former § 55A-80, which dealt with similar subject matter, effective January 1, 1995, to designate the penalty for failure of corporations, directors or officers to answer interrogatories a Class 1 misdemeanor. However, Chapter 55A was rewritten by Session Laws 1993, c. 398, s. 1, effective July 1, 1994.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

Part 4. Definitions.

§ 55A-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Board" or "board of directors" means the group of natural persons vested by the corporation with the management of its affairs whether or not the group is designated as directors in the articles of incorporation or bylaws.

(3) "Bylaws" means the rules (other than the articles) adopted pursuant to this Chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated.

(4) "Charitable or religious corporation" means any corporation that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, or that is organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section and that upon dissolution shall distribute its assets to a charitable or religious corporation, the United States, a state or an entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section.

(4a) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(5) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this Chapter, except a foreign corporation.

(6) "Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(7) "Deliver" includes mail.

(8) "Distribution" means a direct or indirect transfer of money or other property or incurrence of indebtedness by a corporation to or for the benefit of its members, directors, or officers, or to or for the benefit of transferees in liquidation under Article 14 of this Chapter (other than creditors).

(9) "Effective date of notice" is defined in G.S. 55A-1-41.

(10) "Entity" includes corporation and foreign corporation; domestic or foreign business corporation; professional corporation; limited liability company; profit and nonprofit unincorporated association, chapter or other organizational unit; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States, and foreign government.

(11) "Foreign corporation" means a corporation (with or without capital stock) organized under a law other than the law of this State for purposes for which a corporation might be organized under this Chapter.

(12) "Governmental subdivision" includes authority, county, district, and municipality.

(13) "Includes" denotes a partial definition.

(14) "Individual" denotes a natural person legally competent to act and also includes the estate of an incompetent or deceased individual.
(15) "Means" denotes an exhaustive definition.
(16) "Member" means a person who is, by the articles of incorporation or bylaws of the corporation, either (i) specifically designated as a member or (ii) included in a category of persons specifically designated as members. A person is not a member solely by reason of having voting rights or other rights associated with membership.
(17) "Nonprofit corporation" means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, except as permitted by Article 13 of this Chapter, and includes all associations without capital stock formed under Subchapter V of Chapter 54 of the General Statutes or under any act or acts replaced thereby.
(18) "Notice" includes demand and is defined in G.S. 55A-1-41.
(19) "Person" includes individual and entity.
(20) "Principal office" means the office (in or out of this State) so designated in the articles of incorporation, the Designation of Principal Office Address form, or in any subsequent Corporation's Statement of Change of Principal Office Address form filed with the Secretary of State where the principal offices of a domestic or foreign corporation are located.
(21) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.
(22) "Record date" means the date established under Article 7 of this Chapter on which a corporation determines the identity of its members for the purposes of this Chapter.
(23) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under G.S. 55A-8-40(c) for custody of the minutes of the meetings of the board of directors and of the members and for authenticating records of the corporation.
(24) "State," when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory, and insular possession (and their agencies and governmental subdivisions) of the United States.
(25) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.
(26) "Vote" includes authorization by written ballot and written consent. (1955, c. 1230; 1959, c. 1161, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 1; 1993, c. 398, s. 1; 1995, c. 539, s. 15.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, in subdivision (20) substituted "articles of incorporation, the Designation of Principal Office Address form, or in any subsequent corporation's Statement of Change of Principal Office Address form filed with the Secretary of State" for "annual report filed pursuant to G.S. 55A-16-22".

§ 55A-1-41. Notice.

(a) Notice under this Chapter shall be in writing unless oral notice is authorized in the corporation's articles of incorporation or bylaws and written notice is not specifically required by this Chapter.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication, or by facsimile transmission; or by mail or private carrier. If these forms of personal notice are impracticable as to one or more persons, notice may be communicated to such persons by publishing notice in a newspaper, or by radio, television, or other form of public broadcast communication, in the county where the corporation has its principal place of business in the State, or if it has no principal place of business in the State, the county where it has its registered office.

(c) Written notice by a domestic or foreign corporation to its member is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the member's address shown in the corporation's current record of members.

(d) Written notice to a domestic or foreign corporation (authorized to conduct affairs in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its articles of incorporation, the Designation of Principal Office Address form, or any Corporation's Statement of Change of Principal Office Address form filed with the Secretary of State.

(e) Except as provided in subsection (c) of this section, written notice is effective at the earliest of the following:

(1) When received;

(2) Five days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;

(3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(4) If mailed with less than first-class postage, 30 days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with postage thereon prepaid and correctly addressed;

(5) When delivered to the member's address shown in the corporation's current list of members.

(f) Written notice is correctly addressed to a member of a domestic or foreign corporation if addressed to the member's address shown in the corporation's current list of members. In the case of members who are residents of the same household and who have the same address, the corporation's bylaws may provide that a single notice may be given to such members jointly.

(g) Oral notice is effective when actually communicated to the person entitled to oral notice.

(h) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern.

(i) Written notice need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publication regularly sent to members if conspicuously identified as a notice. (1993, c. 398, s. 1; 1995, c. 539, s. 16.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, rewrote subsection (d).

ARTICLE 2.

Organization.

§ 55A-2-02. Articles of incorporation.

(a) The articles of incorporation shall set forth:

(1) A corporate name for the corporation that satisfies the requirements of G.S. 55A-4-01;

(2) If the corporation is a charitable or religious corporation, a statement to that effect if it was incorporated on or after the effective date of this Chapter;

(3) The street address, and the mailing address if different from the street address, of the corporation's initial registered office, the county in which the initial registered office is located, and the name of the corporation's initial registered agent at that address;

(4) The name and address of each incorporator;

(5) Whether or not the corporation will have members;

(6) Provisions not inconsistent with law regarding the distribution of assets on dissolution; and

(7) The street address, and the mailing address, if different from the street address, of the principal office, and the county in which the principal office is located.

(b) The articles of incorporation may set forth any provision that under this Chapter is required or permitted to be set forth in the bylaws, and may also set forth:

(1) The purpose or purposes for which the corporation is organized, which may be, either alone or in combination with other purposes, the transaction of any lawful activity;

(2) The names and addresses of the individuals who are to serve as the initial directors;

(3) Provisions not inconsistent with law regarding:

a. Managing and regulating the affairs of the corporation;

b. Defining, limiting, and regulating the powers of the corporation, its board of directors, and members (or any class of members); and

c. The characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;

(4) A provision limiting or eliminating the personal liability of any director for monetary damages arising out of an action whether by or in the right of the corporation or otherwise for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of the breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55A-8-32 or G.S. 55A-8-33, (iii) any transaction from which the director derived an im-

proper personal financial benefit, or (iv) acts or omissions occurring prior to the date the provision became effective. As used herein, the term "improper personal financial benefit" does not include a director's reasonable compensation or other reasonable incidental benefit for or on account of his service as a director, trustee, officer, employee, independent contractor, attorney, or consultant of the corporation. A provision permitted by this Chapter in the articles of incorporation, bylaws, or a contract or resolution indemnifying or agreeing to indemnify a director against personal liability shall be fully effective whether or not there is a provision in the articles of incorporation limiting or eliminating personal liability.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this Chapter. (1955, c. 1230; 1957, c. 979, s. 11; 1959, c. 1161, s. 5; 1985 (Reg. Sess., 1986), c. 801, ss. 3, 4; 1993, c. 398, s. 1; 1995, c. 539, s. 17.)

Effect of Amendments. — The 1995 amendment, applicable to articles of incorporation filed on or after the date of ratification (July 29, 1995), added subdivision (a)(7) and made related changes.

ARTICLE 4.

Names.

§ 55A-4-01. Corporate name.

(a) A corporate name shall not contain language stating or implying that the corporation is organized for a purpose other than that permitted by G.S. 55A-3-01 and its articles of incorporation.

(b) Except as authorized by subsection (c) of this section, a corporate name shall be distinguishable upon the records of the Secretary of State from:

(1) The corporate name of a domestic nonprofit corporation or a foreign nonprofit corporation authorized to conduct affairs in this State;

(2) The corporate name of a business corporation incorporated or authorized to transact business in this State;

(3) A corporate name reserved or registered under G.S. 55A-4-02, 55A-4-03, 55-4-02, or 55-4-03;

(4) The fictitious name adopted by a foreign business or nonprofit corporation authorized to transact business or conduct affairs in this State because its real name is unavailable; or

(5) The name used, reserved, or registered by a limited liability company pursuant to Chapter 57C of the General Statutes or by a limited partnership pursuant to Chapter 59 of the General Statutes.

(c) A person may apply to the Secretary of State for authorization to use a name that is not distinguishable upon the Secretary of State's records from one or more of the names described in subsection (b) of this section. The Secretary of State shall authorize use of the name applied for if:

(1) The other corporation consents to the use in writing and submits an undertaking in form satisfactory to the Secre-

tary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applicant; or

(2) The applicant delivers to the Secretary of State a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) The use of assumed names or fictitious names as provided for in Chapter 66 of the General Statutes, is not affected by this Chapter.

(e) Neither the reservation or registration of a corporate name nor the incorporation of any domestic corporation shall authorize the use in this State of a corporate name in violation of the rights of any third party under the federal trademark act, the trademark act of this State, or other statutory or common law, or be a defense to an action for violation of any such rights.

(f) The name of a corporation dissolved under Article 14 of this Chapter shall not be used by another corporation until:

(1) In the case of a voluntary dissolution, the expiration of 120 days after the effective date of the dissolution, or

(2) In the case of an administrative dissolution, the expiration of the period within which the corporation may be reinstated pursuant to G.S. 55A-14-22,

unless the dissolved corporation changes its name to a name that is distinguishable upon the records of the Secretary of State from the names of other nonprofit corporations, business corporations, limited partnerships, or limited liability companies organized or transacting business in this State. (1955, c. 1230; 1969, c. 875, s. 3; 1985 (Reg. Sess., 1986), c. 801, s. 7; 1993, c. 398, s. 1; 1995, c. 539, ss. 18, 19.)

Effect of Amendments. — Session Laws 1995, c. 539, ss. 18 and 19, effective July 29, 1995, added subdivision (b)(5), rewrote subsection (f), and made related changes.

ARTICLE 5.

Office and Agent.

§ 55A-5-01. Registered office and registered agent.

(a) Each corporation shall continuously maintain in this State:

(1) A registered office that may be the same as any place where it conducts affairs; and

(2) A registered agent, who shall be:

a. An individual who resides in this State and whose office is identical with the registered office;

b. A domestic business or nonprofit corporation whose office is identical with the registered office; or

c. A foreign business or nonprofit corporation authorized to transact business or conduct affairs in this State whose office is identical with the registered office.

(b) The sole duty of the registered agent to the corporation is to forward to the corporation at its last known address any notice, process, or demand that is served on the registered agent. (1955, c. 1230; 1957, c. 979, s. 20; 1993, c. 398, s. 1; 1995, c. 400, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the subsection (a) designation and added subsection (b).

§ 55A-5-02. Change of registered office or registered agent.

(a) A corporation may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

(1) The name of the corporation;

(2) The street address, and the mailing address if different from the street address, of the corporation's current registered office, and the county in which it is located;

(3) If the address of the corporation's registered office is to be changed, the street address, and the mailing address if different from the street address, of the new registered office, and the county in which it is located;

(4) The name of its current registered agent;

(5) If the current registered agent is to be changed, the name of the new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) That after the change or changes are made, the addresses of its registered office and the office of its registered agent will be identical.

(b) If a registered agent changes the address of his office, he may change the address of the registered office of any corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement that complies with the requirements of subsection (a) of this section and recites that the corporation has been notified of the change.

(c) Repealed by Session Laws 1995, c. 539, s. 20, effective July 29, 1995. (1955, c. 1230; 1957, c. 979, ss. 12, 13; 1973, c. 314, ss. 1, 2; 1993, c. 398, s. 1; 1995, c. 539, s. 20.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, repealed subsection (c) regarding change of its registered office by a corporation.

§ 55A-5-02.1. Principal office address.

(a) Any corporation that does not designate the street address and the mailing address, if different from the street address, of the corporation's principal office and the county of location in an annual report or its articles of incorporation shall file a Designation of Principal Office Address form with the Secretary of State that contains that information.

(b) A corporation may change its principal office by delivering to the Secretary of State for filing a Corporation's Statement of Change of Principal Office form that sets forth:

(1) The street address, and the mailing address if different from the street address, of the corporation's current principal office and the county in which it is located; and

(2) The street address, and the mailing address if different from the street address, of the new principal office and the county in which it is located. (1995, c. 539, s. 21.)

Editor's Note. — Session Laws 1995, c. 539, s. 38(c), made this section effective upon ratification. The Act was ratified July 29, 1995.

§ 55A-5-03. Resignation of registered agent.

(a) A registered agent may resign his agency appointment by signing and filing with the Secretary of State the signed original and two exact or conformed copies of a statement of resignation which may include a statement that the registered office is also discontinued. The statement shall include or be accompanied by a certification from the registered agent that he has mailed or delivered to the corporation at its last known address written notice of this resignation. The certification shall include the name and title of the officer notified, if any, and the address to which the notice was mailed or delivered.

(b) After filing the statement the Secretary of State shall mail one copy to the registered office (if not discontinued) and the other copy to the corporation at its principal office.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed. (1955, c. 1230; 1957, c. 979, ss. 12, 13; 1973, c. 314, ss. 1, 2; 1993, c. 398, s. 1; 1995, c. 539, s. 22.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "as shown in its most recent annual report" from the end of subsection (b).

§ 55A-5-04. Service on corporation.

(a) A corporation's registered agent is an agent of the corporation for service of process, notice, or demand required or permitted by law to be served on the corporation.

(b) When a corporation fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office, the Secretary of State shall be an agent of the corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice, or demand. In the event any process, notice, or demand is served on the Secretary of State, he shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the corporation at its principal office shown in its most recent annual report, if applicable, the articles of incorporation, the Designation of Principal Office Address form, in any subsequent Corporation's Statement of Change of Principal Office Address form, or in any subsequent communication received from the corporation stating the current mailing address of its principal office or, if there is no mailing address for the principal office on file, to the corporation at its registered office. Service on a corporation under this subsection shall be effective for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices, and demands served upon the Secretary of State under this section and shall record therein the date of service and his action with reference thereto.

(d) Nothing in this section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1955, c. 1230; 1977, 2nd Sess., c. 1219, s. 35; 1993, c. 398, s. 1; 1995, c. 539, s. 23.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "if applicable, the articles of incorporation, the Designation of Principal Office Address form , in any subsequent Corporation's Statement of Change of Principal Office Address Form" in subsection (b).

ARTICLE 7.

Members' Meetings and Voting; Derivative Proceedings.

Part 2. Voting.

§ 55A-7-21. Voting entitlement generally.

(a) Unless the articles of incorporation or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members.

(b) Unless the articles of incorporation or bylaws provide otherwise, if a membership stands of record in the names of two or more persons, their acts with respect to voting shall have the following effect:

(1) If only one votes, such act binds all; and

(2) If more than one votes, the vote shall be divided on a pro rata basis.

(c) An amendment to the articles of incorporation or bylaws on which members are entitled to vote, the purpose of which is to increase or decrease the number of votes any member is entitled to cast on any member action, shall be approved by the members entitled to vote on that action by a vote that would be sufficient to take the action before the amendment. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 1995, c. 400, s. 2.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (c) substituted "An amendment to the articles of incorporation or bylaws on which member are entitled to vote, the purpose of which is" for "A bylaw amendment", added "by a vote that would be sufficient to take the action before the amendment", and made a punctuation change.

§ 55A-7-23. Voting requirements.

(a) Unless this Chapter, the articles of incorporation, or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote of a majority of the votes cast is the act of the members.

(b) An amendment to the articles of incorporation or bylaws on which members are entitled to vote, the purpose of which is to increase or decrease the vote required for any member action, shall be approved by the members entitled to vote on that action by a vote that would be sufficient to take the action before the amendment. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 400, s. 3.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (b) substituted "An amendment to the articles of incorporation or bylaws on which members are entitled to vote, the purpose of which is" for "A bylaw amendment", added "by a vote that would be sufficient to take the action before the amendment", and made a punctuation change.

§ 55A-7-27. Corporation's acceptance of votes.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a member, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member.

(b) If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the record name of a member, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member if:

(1) The member is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) The name signed purports to be that of an attorney-in-fact of the member and, if the corporation requests it, evidence acceptable to the corporation of the signatory's authority to sign for the member is presented with respect to the vote, consent, waiver, or proxy appointment;

(3) Two or more persons hold the membership as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coholders and the person signing appears to be acting on behalf of all the coholders; or

(4) In the case of a corporation other than a charitable or religious corporation:

  a. The name signed purports to be that of an administrator, executor, guardian, or conservator representing the member and, if the corporation requests it, evidence of fiduciary status acceptable to the corporation is presented with respect to the vote, consent, waiver, or proxy appointment;

  b. The name signed purports to be that of a receiver or trustee in bankruptcy of the member, and, if the corporation requests it, evidence of this status acceptable to the corporation is presented with respect to the vote, consent, waiver, or proxy appointment.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(d) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the member for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise. (1993, c. 398, s. 1; 1995, c. 509, s. 27.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "or" for "and" at the end of subdivision (b)(3).

Part 4. Derivative Proceedings.

§ 55A-7-40. Derivative proceedings.

CASE NOTES

Derivative Action Not Appropriate. — Even if the board had exceeded its authority, a member's derivative action would not have been the appropriate cause of action where plaintiff alleged no injury to the association by the board's action and was not seeking to recover on behalf of the association. Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995).

ARTICLE 8.

Directors and Officers.

Part 1. Board of Directors.

§ 55A-8-05. Terms of directors generally.

(a) The articles of incorporation or bylaws may specify the terms of directors. In the absence of a contrary provision in the articles of incorporation or bylaws, the term of each director shall be one year, and directors may serve successive terms.

(b) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(c) Except as provided in the articles of incorporation or bylaws:

(1) The term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and

(2) The term of a director filling any other vacancy expires at the end of the unexpired term that such director is filling.

(d) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated, or appointed and qualifies, or until there is a decrease in the number of directors. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1; 1995, c. 509, s. 28.)

Effect of Amendments. — The 1995 amendment, effective retroactively to July 1, 1994, substituted "of" for "or" preceding "incorporation" in subsection (a).

Part 2. Meetings and Action of the Board.

§ 55A-8-23. Waiver of notice.

(a) A director may waive any notice required by this Chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b) of this section, the waiver shall be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, ss. 24, 25; 1993, c. 398, s. 1; 1995, c. 509, s. 29.)

Effect of Amendments. — The 1995 amendment, effective retroactively to July 1, 1994, substituted "incorporation" for "corporation" in subsection (a).

ARTICLE 10.

Amendment of Articles of Incorporation and Bylaws.

Part 1. Amendment of Articles of Incorporation.

§ 55A-10-03. Amendment by directors and members.

(a) If the corporation has members entitled to vote thereon, then, unless this Chapter, the articles of incorporation, bylaws, the members (acting pursuant to subsection (b) of this section), or the board of directors (acting pursuant to subsection (c) of this section) require a greater vote or voting by class, an amendment to a corporation's articles of incorporation to be adopted shall be approved:

(1) By the board or in lieu thereof in writing by the number or proportion of members entitled under G.S. 55A-7-02(a)(2) to call a special meeting to consider such amendment;

(2) By the members entitled to vote thereon by two-thirds of the votes cast or a majority of the votes entitled to be cast on the amendment, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30.

(b) The members entitled to vote thereon may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(c) If the board initiates an amendment to the articles of incorporation or board approval is required by subsection (a) of this section to adopt an amendment to the articles of incorporation, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or any other basis.

(d) If the board or the members seek to have the amendment approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) If the board or the members seek to have the amendment approved by the members entitled to vote thereon by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. (1955, c. 1230; 1981, c. 372; 1985 (Reg. Sess., 1986), c. 801, ss. 36, 37; 1993, c. 398, s. 1; 1995, c. 400, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subdivision (a)(2) substituted "entitled to vote thereon by two-thirds of the votes cast or" for "by", and added "whichever is less".

Part 3. Articles of Incorporation and Bylaws.

§ 55A-10-30. Approval by third persons.

The articles of incorporation or bylaws may require an amendment to the articles of incorporation or bylaws to be approved in writing by a specified person or persons other than the board of directors. Such a provision in the articles of incorporation or bylaws may only be amended with the approval in writing of such person or persons. (1993, c. 398, s. 1; 1995, c. 509, s. 30.)

Effect of Amendments. — The 1995 amendment, effective retroactively to July 1, 1994, substituted "of" for "or" following "to the articles" in the first sentence.

ARTICLE 11.

Merger.

§ 55A-11-01. Approval of plan of merger.

(a) Subject to the limitations set forth in G.S. 55A-11-02, one or more nonprofit corporations may merge into another nonprofit corporation, if the plan of merger is approved as provided in G.S. 55A-11-03.

(b) The plan of merger shall set forth:

(1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(2) The terms and conditions of the merger; and

(3) The manner and basis, if any, of converting memberships of each merging corporation into memberships, obligations, or securities of the surviving or any other corporation or into cash or other property in whole or part.

(c) The plan of merger may set forth:

(1) Any amendments to the articles of incorporation or bylaws of the surviving corporation to be effected by the merger; and

(2) Other provisions relating to the merger. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 400, s. 5.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "another" for "a business or" in subsection (a).

§ 55A-11-02. Limitations on mergers by charitable or religious corporations.

(a) Without the prior approval of the superior court in a proceeding in which the Attorney General has been given written notice, a charitable or religious corporation may merge only with:

(1) A charitable or religious corporation;

(2) A foreign corporation that would qualify under this Chapter as a charitable or religious corporation;

(3) A wholly owned foreign or domestic corporation (business or nonprofit) which is not a charitable or religious corporation, provided the charitable or religious corporation is the surviving corporation and continues to be a charitable or religious corporation after the merger; or

(4) A business or nonprofit corporation other than a charitable or religious corporation, provided that: (i) on or prior to the effective date of the merger, assets with a value equal to the greater of the fair market value of the net tangible and intangible assets (including goodwill) of the charitable or religious corporation or the fair market value of the charitable or religious corporation if it were to be operated as a business concern are transferred or conveyed to one or more persons who would have received its assets under G.S. 55A-14-03(a)(1) and (2) had it dissolved; (ii) it shall return, transfer or convey any assets held by it upon condition requiring return, transfer or conveyance, which condition occurs by reason of the merger, in accordance with such condition; and (iii) the merger is approved by a majority of directors of the charitable or religious corporation who are not and will not become members or shareholders in or directors, officers, employees, agents, or consultants of the surviving corporation.

(b) At least 20 days before consummation of any merger of a charitable or religious corporation pursuant to subdivision (a)(4) of this section, notice, including a copy of the proposed plan of merger, shall be delivered to the Attorney General.

(c) Without the prior written consent of the Attorney General, or approval of the superior court in a proceeding in which the Attorney General has been given notice, no member of a charitable or religious corporation may receive or retain any property as a result of a merger other than a membership in the surviving corporation. The Attorney General may consent to the transaction, or the court shall approve the transaction, if it is fair and not contrary to the public interest. (1993, c. 398, s. 1; c. 553, s. 83(a); 1995, c. 400, s. 6.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "G.S. 55A-14-03(a)(1) and (2)" for "G.S. 55A-14-06(a)(5) and (6)" in subdivision (a)(4)(i).

§ 55A-11-06. Merger with foreign corporation.

(a) Except as provided in G.S. 55A-11-02, one or more foreign nonprofit corporations may merge with one or more domestic nonprofit corporations if:

(1) The merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated

and each foreign corporation complies with that law in effecting the merger;

(2) The foreign corporation complies with G.S. 55A-11-04 if it is the surviving corporation of the merger; and

(3) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03 and, if it is the surviving corporation of the merger, with G.S. 55A-11-04.

(b) Upon the merger taking effect, the surviving corporation, if it does not have a registered agent in this State, shall be deemed to have appointed the Secretary of State as its registered agent for service of process in a proceeding to enforce any obligation of a domestic corporation party to the merger, until such time as it appoints a registered agent in this State. (1973, c. 314, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 39; 1993, c. 398, s. 1; 1995, c. 400, s. 7.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (a) deleted "business or" following "foreign" in the introductory language, and in subdivision (a)(1) substituted "country" for "county".

§ 55A-11-08. Merger with business corporation.

(a) One or more domestic or foreign business corporations may merge with one or more domestic nonprofit corporations if:

(1) Each domestic business corporation complies with the applicable provisions of G.S. 55-11-01, 55-11- 03, and 55-11-04;

(2) In a merger involving one or more foreign business corporations, the merger is permitted by the law of the state or country under whose law each foreign business corporation is incorporated and each foreign business corporation complies with that law in effecting the merger;

(3) The domestic or foreign business corporation complies with G.S. 55A-11-04 if it is the surviving corporation; and

(4) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03 and, if it is the surviving corporation, with G.S. 55A-11-04.

(b) Upon the merger taking effect, if the surviving corporation does not have a registered agent in this State, it shall be deemed to have appointed the Secretary of State as its registered agent for service of process in a proceeding to enforce any obligation of a domestic nonprofit corporation party to the merger, until such time as it appoints a registered agent in this State.

(c) This section does not limit the power of a domestic or foreign business corporation to acquire all or part of the memberships of one or more classes of a domestic nonprofit corporation through a voluntary exchange or otherwise. (1995, c. 400, s. 8.)

Editor's Note. — Session Laws 1995, c. 400, s. 14, made this section effective October 1, 1995.

ARTICLE 14.

Dissolution.

Part 2. Administrative Dissolution.

§ 55A-14-20. (Effective until July 1, 1996) Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55A-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(2) Repealed by Session Laws 1995, c. 539, s. 24, effective July 29, 1995.

(3) The corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;

(5) The corporation's period of duration stated in its articles of incorporation expires; or

(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter. (1993, c. 398, s. 1; 1995, c. 539, s. 24.)

Section Set Out Twice. — The section above is effective until July 1, 1996. For the section as amended effective July 1, 1996, see the following section, also numbered § 55A-14-20.

Effect of Amendments. — Session Laws 1995, c. 539, s. 24, effective July 29, 1995, repealed subdivision (2) regarding delivery of the corporation's annual report.

§ 55A-14-20. (Effective July 1, 1996) Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55A-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(2) Repealed by Session Laws 1995, c. 539, s. 24, effective July 29, 1995.

(3) The corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;

(5) The corporation's period of duration stated in its articles of incorporation expires;

(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter; or

(7) The corporation does not designate the address of its principal office with the Secretary of State or does not notify the Secretary of State within 60 days that the principal office has changed. (1993, c. 398, s. 1; 1995, c. 539, ss. 24, 25.)

Section Set Out Twice. — The section above is effective July 1, 1996. For the section as in effect until July 1, 1996, see the preceding section, also numbered § 55A-14-20.

Effect of Amendments. — Session Laws 1995, c. 539, s. 25, effective July 1, 1996, and applicable to proceedings commenced on or after that date, added subdivision (7) and made related changes.

ARTICLE 15.

Foreign Corporations.

Part 1. Certificate of Authority.

§ 55A-15-09. Resignation of registered agent of foreign corporation.

(a) The registered agent of a foreign corporation may resign his agency appointment by signing and filing with the Secretary of State the signed original and two exact or conformed copies of a statement of resignation, which may include a statement that the registered office is also discontinued. The statement shall include or be accompanied by a certificate from the registered agent that the registered agent has mailed or delivered to the corporation at its last known address written notice of this resignation. Such certification shall include the name and title of the officer notified, if any, and the address to which the notice was mailed or delivered.

(b) After filing the statement, the Secretary of State shall mail one copy to the registered office (if not discontinued) and the other copy to the foreign corporation at its principal office.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed. (1993, c. 398, s. 1; 1995, c. 539, s. 26.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "shown in its most recent annual report" from the end of subsection (b).

§ 55A-15-10. Service on foreign corporation.

(a) The registered agent of a foreign corporation authorized to conduct affairs in this State is an agent of the corporation for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.

(b) When a foreign corporation authorized to conduct affairs in this State fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office, or when its certificate of authority shall have been revoked under G.S. 55A-15-31, the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any clerk having charge of the corporation department of the Secretary of State's office, duplicate copies of such process, notice, or demand. In the event any process, notice, or demand is served on the Secretary of State, he shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the corporation at its principal office shown in its most recent annual report, if applicable, the articles of incorporation, the Designation of Principal Office Address form, in any subsequent Corporation's Statement of Change of Principal Office Address form, or in any subsequent communication received from the corporation stating the current mailing address of its principal office or, if there is no mailing address for the principal office on file, to the corporation at its registered office. Service on a foreign corporation under this subsection shall be effective for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices, and demands served upon the Secretary of State under this section and shall record therein the date of service and his action with reference thereto.

(d) Nothing in this section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law. (1955, c. 1230; 1967, c. 954, s. 3; 1973, c. 314, s. 8; 1993, c. 398, s. 1; 1995, c. 539, s. 27.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "if applicable, the articles of incorporation, the Designation of Principal Office Address form , in any subsequent Corporation's Statement of Change of Principal Office Address Form" in subsection (b).

Part 2. Withdrawal.

§ 55A-15-20. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to conduct affairs in this State shall not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to conduct affairs in this State may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application shall set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not conducting affairs in this State and that it surrenders its authority to conduct affairs in this State;

(3) That the corporation revokes the authority of its registered agent to accept service of process and consents that service

of process in any action or proceeding based upon any cause of action arising in this State, or arising out of affairs conducted in this State, during the time the corporation was authorized to conduct affairs in this State may thereafter be made on such corporation by service thereof on the Secretary of State;

(4) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under subdivision (3) of this subsection; and

(5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(c) If the Secretary of State finds that the application conforms to law, the Secretary of State shall:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed", and the hour, day, month, and year of the filing thereof;

(2) File the application in the Secretary of State's office;

(3) Issue a certificate of withdrawal to which the Secretary of State shall affix the exact or conformed copy of the application; and

(4) Send to the foreign corporation or its representative the certificate of withdrawal together with the exact or conformed copy of the application affixed thereto.

(d) After the withdrawal of the corporation is effective, service of process on the Secretary of State in accordance with subdivision (b)(3) of this section is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the foreign corporation at the mailing address set forth under subsection (b) of this section. (1955, c. 1230; 1973, c. 476, s. 193; 1993, c. 398, s. 1; 1995, c. 400, s. 9.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (c) added subdivision (c)(4), and made stylistic changes.

Part 3. Revocation of Certificate of Authority.

§ 55A-15-30. Grounds for revocation.

(a) The Secretary of State may commence a proceeding under G.S. 55A-15-31 to revoke the certificate of authority of a foreign corporation authorized to conduct affairs in this State if:

(1) Repealed by Session Laws 1995, c. 539, s. 28, effective July 29, 1995.

(2) The foreign corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(3) The foreign corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The foreign corporation does not inform the Secretary of State under G.S. 55A-15-08 or G.S. 55A-15-09 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) An incorporator, director, officer, or agent of the foreign corporation signs a document he knew was false in any

material respect with intent that the document be delivered to the Secretary of State for filing;

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger;

(7) The corporation is exceeding the authority conferred upon it by this Chapter; or

(8) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter.

(b) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 509, s. 32; c. 539, s. 28.)

Effect of Amendments. — Session Laws 1995, c. 509, s. 32, effective retroactively to July 1, 1994, substituted "it" for "is" in subdivision (a)(6).

Session Laws 1995, c. 539, s. 28, effective July 29, 1995, repealed subdivision (a)(1) regarding delivery of the annual report.

§ 55A-15-31. Procedure and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55A-15-30 for revocation of a certificate of authority, the Secretary of State shall mail to the foreign corporation written notice of the Secretary of State's determination.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the foreign corporation.

(c) The authority of a foreign corporation to conduct affairs in this State ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action arising in this State or arising out of affairs conducted in this State during the time the foreign corporation was authorized to conduct affairs in this State. The Secretary of State shall then proceed in accordance with G.S. 55A-15-10.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

(f) The corporation shall not be granted a new certificate of authority until each ground for revocation has been substantially corrected to the reasonable satisfaction of the Secretary of State. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 400, s. 10.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added subsection (f).

§ 55A-15-33. Inapplicability of Administrative Procedure Act.

The Administrative Procedure Act shall not apply to any proceeding or appeal provided for in G.S. 55A-15-30 through G.S. 55A-15-32. (1995, c. 400, s. 11.)

Editor's Note. — Session Laws 1995, c. 400, s. 14, made this section effective October 1, 1995.

ARTICLE 16.

Records and Reports.

Part 1. Records.

§ 55A-16-01. Corporate records.

(a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting pursuant to G.S. 55A-7-04, [G.S.] 55A-7-08, or [G.S.] 55A-8-21, and a record of all actions taken by committees of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its members, in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(e) A corporation shall keep a copy of the following records at its principal office:

(1) Its articles of incorporation or restated articles of incorporation and all amendments to them currently in effect;

(2) Its bylaws or restated bylaws and all amendments to them currently in effect;

(3) Resolutions adopted by its members or board of directors relating to the number or classification of directors or to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;

(4) The minutes of all membership meetings, and records of all actions taken by the members without a meeting pursuant to G.S. 55A-7-04 or G.S. 55A-7-08, for the past three years;

(5) All written communications to members generally within the past three years, and the financial statements, if any, that have been furnished or would have been required to be furnished to a member upon demand under G.S. 55A-16-20 during the past three years;

(6) A list of the names and business or home addresses of its current directors and officers; and

(7) Repealed by Session Laws 1995, c. 539, s. 29, effective July 29, 1995. (1955, c. 1230; 1969, c. 875, s. 6; 1985 (Reg. Sess., 1986), c. 801, s. 31; 1993, c. 398, s. 1; 1995, c. 539, s. 29.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, repealed subdivision (e)(7) regarding delivery of the annual report.

§ 55A-16-05. Limitations on use of membership list.

Without consent of the board of directors, a membership list or any part thereof shall not be obtained or used by any person for any purpose unrelated to a member's interest as a member. Without limiting the generality of the foregoing, and without the consent of the board, a membership list or any part thereof shall not be:

(1) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;

(2) Used for any commercial purpose; or

(3) Sold to or purchased by any person. (1993, c. 398, s. 1; 1995, c. 509, s. 33.)

Effect of Amendments. — The 1995 amendment, effective retroactively to July 1, 1994, substituted a semicolon for a colon at the end of subdivision (1).

§ 55A-16-22: Repealed by Session Laws 1995, s. 539, s. 8, effective October 1, 1995.

Article 17.

Transition and Curative Provisions.

§ 55A-17-01. Applicability of Chapter.

(a) The provisions of this Chapter relating to domestic corporations shall apply to:

(1) All corporations heretofore or hereafter organized under this Chapter.

(2) All nonprofit corporations without capital stock heretofore or hereafter organized under any other act, unless there is some other specific statutory provision particularly applicable to such corporations or inconsistent with some provisions of this Chapter, in which case that other provision prevails. Nothing herein shall apply to hospital and medical service corporations as defined in Article 65 of Chapter 58 of the General Statutes which were incorporated prior to July 1, 1957, or repeal or modify the provisions of G.S. 54-138.

(b) The provisions of this Chapter relating to foreign corporations shall apply to all corporations conducting affairs in this State for purposes for which a corporation might be organized under this Chapter. A foreign corporation authorized to conduct affairs in this State on July 1, 1994, is subject to this Chapter but is not required to obtain a new certificate of authority to conduct affairs under this Chapter. (1955, c. 1230; 1967, c. 659; 1991, c. 720, s. 76; 1993, c. 398, s. 1; 1995, c. 400, s. 12.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (b) deleted "such" following "all" in the first sentence, and added the last sentence.

Chapter 55B.

Editor's Note. — The legislation and annotations affecting Chapter 55B have been included in a recently published replacement chapter.

Chapter 57C.

North Carolina Limited Liability Company Act.

Article 1.

General Provisions.

Part 1. Short Title; Reservation of Power; Definitions.

Sec.
57C-1-03. Definitions.

Part 2. Filing Documents.

57C-1-22.1. Expedited filings.
57C-1-25. Filing duty of Secretary of State.
57C-1-27. Evidentiary effect of copy of filed document.
57C-1-29. Penalty for signing false document.

Part 3. Secretary of State.

57C-1-32. Penalties imposed upon domestic and foreign limited liability companies for failure to answer interrogatories.

Article 2.

Purposes, Powers, Formation, Annual Report, Name, Registered Office, and Agent.

Part 1. Purposes and Powers.

57C-2-01. Purposes.

Part 3. Name.

57C-2-30. Name.

Part 4. Registered Office and Registered Agent.

Sec.
57C-2-41. Change of registered office or registered agent.

Article 3.

Membership and Management.

Part 1. Membership.

57C-3-02. Cessation of membership.

Part 2. Managers.

57C-3-21. Qualification, designation, and removal of managers.

Part 3. Liability.

57C-3-32. Limitation of liability of managers and members and permissive indemnification of managers and members; insurance.

Article 5.

Assignment of Membership Interests; Withdrawal.

57C-5-07. Distribution upon withdrawal.

Article 6.

Dissolution.

57C-6-01. Dissolution.
57C-6-02. Judicial dissolution.

ARTICLE 1.

General Provisions.

Part 1. Short Title; Reservation of Power; Definitions.

§ 57C-1-01. Short title.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

§ 57C-1-03. Definitions.

The following definitions apply in this Chapter, unless otherwise specifically provided:

(1) Articles of organization. — The document filed under G.S. 57C-2-20 of this Chapter for the purpose of forming a limited liability company, as amended or restated.

(2) Bankrupt. — Bankrupt under the United States Bankruptcy Code, as amended, or insolvent under State insolvency laws.

(3) Business. — Any trade, occupation, investment, or other commercial activity engaged in for gain or profit.

(4) Corporation. — Has the same meaning as in G.S. 55-1-40(4).

(5) Court. — Includes every court and judge having jurisdiction in the case.

(6) Distribution. — A direct or indirect transfer of money or other property or incurrence of indebtedness by a limited liability company to or for the benefit of its members in respect of their membership interests.

(7) Foreign corporation. — Has the same meaning as in G.S. 55-1-40(10).

(8) Foreign limited liability company. — An unincorporated organization formed under laws other than the laws of this State, that affords to each of its members, pursuant to the laws under which it is formed, limited liability with respect to the liabilities of the organization.

(9) Foreign limited partnership. — Has the same meaning as in G.S. 59-102(5).

(10) Individual. — A human being.

(11) Limited liability company or domestic limited liability company. — An entity formed and existing under this Chapter.

(12) Limited partnership or domestic limited partnership. — Has the same meaning as in G.S. 59-102(8).

(13) Manager. — Has the following meanings: (i) with respect to a limited liability company that has set forth in its articles of organization that it is to be or may be managed by persons other than members, any person designated in accordance with G.S. 57C-3-20(a), (ii) with respect to any other limited liability company, its members, and (iii) with respect to a foreign limited liability company, any person authorized to act for and bind the foreign limited liability company.

(14) Member. — A person who has been admitted to membership in the limited liability company as provided in G.S. 57C-3-01 until the person's membership ceases as provided in G.S. 57C-3-02 or G.S. 57C-5-02.

(15) Membership interest or interest. — All of a member's rights in the limited liability company, including without limitation the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company assets, any right to vote, and any right to participate in management.

(16) Operating agreement. — Any agreement, written or oral, of the members with respect to the affairs of a limited

liability company and the conduct of its business that is binding on all the members.

(17) Person. — An individual, a trust, an estate, or a domestic or foreign corporation, a domestic or foreign professional corporation, a domestic or foreign partnership, a domestic or foreign limited partnership, a domestic or foreign limited liability company, an unincorporated association, or another entity.

(18) State. — A state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. (1993, c. 354, s. 1; 1995, c. 351, ss. 1, 2.)

Effect of Amendments. — Session Laws 1995, c. 351, ss. 1 and 2, effective October 1, 1995, in subdivision (14) added "or G.S. 57C-5-02" to the end; and in subdivision (17) substituted "or" for "corporation, a" following "or a domestic", inserted "domestic or foreign" preceding "partnership", "limited partnership", and "limited liability company" and deleted "a foreign limited liability company" preceding "an unincorporated association".

Part 2. Filing Documents.

§ 57C-1-22.1. Expedited filings.

The Secretary of State shall guarantee the expedited filing of a document upon receipt of the document in proper form and the payment of the required filing fee. The Secretary of State may collect the following additional fees for the expedited filing of a document received in good form:

(1) Two hundred dollars ($200.00) for the filing by the end of the same business day of a document received by 12:00 noon Eastern Standard Time; and

(2) One hundred dollars ($100.00) for the filing of a document within 24 hours after receipt, excluding weekends and holidays.

The Secretary of State shall not collect the fees allowed in this section unless the person submitting the document for filing requests an expedited filing and is informed by the Secretary of State of the fees prior to the filing of the document. (1995, c. 539, s. 30.)

Editor's Note. — Session Laws 1995, c. 539, s. 38(c), made this section applicable to expedited filings submitted on or after the date of ratification (July 29, 1995).

§ 57C-1-25. Filing duty of Secretary of State.

(a) If a document delivered to the Office of the Secretary of State for filing satisfies the requirements of this Chapter, the Secretary of State shall file it. Documents filed with the Secretary of State pursuant to this Chapter may be maintained by the Secretary either in their original form or in photographic, microfilm, optical disk media, or other reproduced form. The Secretary may make reproductions of documents filed under this Chapter, or under any predecessor act, by photographic, microfilm, optical disk media, or other means of reproduction, and may destroy the originals of those documents reproduced.

(b) The Secretary of State files a document by stamping or otherwise endorsing “Filed”, together with the Secretary of State’s name and official title and the date and time of filing, on both the original and the document copy. After filing a document, the Secretary of State shall deliver the document copy to the domestic or foreign limited liability company or its representative.

(c) If the Secretary of State refuses to file a document, the Secretary of State shall return it to the domestic or foreign limited liability company or its representative within five days after the document was received, together with a brief, written explanation of the reason for refusal. The Secretary of State may correct apparent errors and omissions on a document submitted for filing if authorized to make the corrections by the person submitting the document for filing. The authorization to make the corrections shall be confirmed, according to procedures adopted by rule, by the Secretary prior to making the correction.

(d) The Secretary of State’s duty is to review and file documents that satisfy the requirements of this Chapter. The Secretary of State’s filing or refusing to file a document does not:

(1) Affect the validity or invalidity of the document in whole or part;
(2) Relate to the correctness or incorrectness of information contained in the document; or
(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (1993, c. 354, s. 1; 1995, c. 539, s. 31.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, added the second and third sentences in subsections (a) and (c), and made the section gender neutral.

§ 57C-1-27. Evidentiary effect of copy of filed document.

A certificate attached to a copy of a document filed by the Secretary of State, bearing the Secretary of State’s signature (which may be in facsimile) and the seal of office and certifying that the copy is a true copy of the document, is conclusive evidence that the original document is on file with the Secretary of State. A photographic, microfilm, optical disk media, or other reproduced copy of a document filed pursuant to this Chapter or any predecessor act, when certified by the Secretary, shall be considered an original for all purposes and is admissible in evidence in like manner as an original. (1993, c. 354, s. 1; 1995, c. 539, s. 32.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the last sentence and made stylistic changes.

§ 57C-1-29. Penalty for signing false document.

(a) A person commits an offense if the person signs a document the person knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing.

(b) An offense under this section is a Class 1 misdemeanor. (1993, c. 354, s. 1; 1994, Ex. Sess., c. 14, s. 38.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

Part 3. Secretary of State.

§ 57C-1-32. Penalties imposed upon domestic and foreign limited liability companies for failure to answer interrogatories.

(a) If a foreign or domestic limited liability company fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter, the Secretary of State may suspend its articles of organization or its certificate of authority to do business in this State.

(b) Each manager of a foreign or domestic limited liability company who fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to the manager by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1993, c. 354, s. 1; 1994, Ex. Sess., c. 14, s. 39.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in subsection (b).

ARTICLE 2.

Purposes, Powers, Formation, Annual Report, Name, Registered Office, and Agent.

Part 1. Purposes and Powers.

§ 57C-2-01. Purposes.

(a) Every limited liability company organized under this Chapter has the purpose of engaging in any lawful business unless a more limited lawful purpose is set forth in its articles of organization.

(b) A domestic or foreign limited liability company engaging in a business that is subject to regulation under another statute of this State may be formed or authorized to transact business under this Chapter only if permitted by and subject to all limitations of the other statute giving effect to subsection (c) of this section.

(c) Subsections (a) and (b) of this section to the contrary notwithstanding and except as set forth in this subsection, a domestic or foreign limited liability company shall engage in rendering professional services only to the extent that a professional corporation acting pursuant to Chapter 55B of the General Statutes or a corporation acting pursuant to Chapter 55 of the General Statutes may engage in rendering professional services under the conditions and limitations imposed by an applicable licensing statute. Chapter 55B of the General Statutes and each applicable licensing statute are deemed amended to provide that professionals licensed under the applicable licensing statute may render professional services through a domestic or foreign limited liability company. For purposes of applying the provisions, conditions, and limitations of Chapter 55B of the General Statutes and the applicable licensing statute to domestic and foreign limited liability companies that engage in rendering professional services, (i) unless the context clearly requires otherwise, references to Chapter 55 of the General Statutes (the North Carolina Business Corporation Act) shall be treated as references to this Chapter, and references to a "corporation" or "foreign corporation" shall be treated as references to a limited liability company or foreign limited liability company, respectively, (ii) members shall be treated in the same manner as shareholders of a professional corporation, (iii) managers shall be treated in the same manner as directors of a professional corporation, (iv) the persons signing the articles of organization of a limited liability company shall be treated in the same manner as the incorporators of a professional corporation, and (v) the name of a domestic or foreign limited liability company so engaged shall comply with G.S. 57C-2-30 or G.S. 57C-7-06 and, in addition, shall contain the word "Professional" or the abbreviation "P.L.L.C." or "PLLC". For purposes of this subsection, "applicable licensing statute" shall mean those provisions of the General Statutes referred to in G.S. 55B-2(6).

Nothing in this Chapter shall be interpreted to abolish, modify, restrict, limit, or alter the law in this State applicable to the professional relationship and liabilities between the individual furnishing the professional services and the person receiving the professional services, or the standards of professional conduct applicable to the rendering of the services. This Chapter does not relieve individuals of responsibilities, obligations, or the imposition of sanctions under applicable licensing statutes, even if the sanctions are imposed for the conduct of other members of a limited liability company. A member or manager of a professional limited liability company is not individually liable for debts and obligations of the professional limited liability company arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the professional limited liability company's business by another member or manager or a representative of the professional limited liability company not working under the supervision or direction of the first member or manager at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first member or manager was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other member or manager or representative. (1993, c. 354, s. 1; 1995, c. 351, s. 21.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, rewrote the first sentence in the first paragraph of subsection (c) and added the second sentence in the second paragraph of subsection (c).

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

Part 3. Name.

§ 57C-2-30. Name.

(a) The name of a limited liability company:

(1) Must contain the words "limited liability company" or the abbreviation "L.L.C." or "LLC", or the combination "ltd. liability co.", "limited liability co.", or "ltd. liability company";

(2) May not contain language stating or implying that the limited liability company is organized for a purpose other than that permitted by G.S. 57C-2-01 and its articles of organization; and

(3) If the limited liability company is authorized to engage in rendering professional services, must comply with G.S. 57C-2-01(c).

(b) Except as authorized by subsection (c) of this section, the name of a limited liability company must be distinguishable upon the records of the Secretary of State from:

(1) The name of a corporation, nonprofit corporation, limited partnership, or limited liability company organized in this State, or a foreign corporation or nonprofit corporation, foreign limited partnership, or foreign limited liability company authorized to transact business in this State;

(2) A name reserved under G.S. 55-4-02, 55-4-03, 57C-2-31, 57C-2-32, or 59-104; and

(3) The fictitious name adopted by a foreign corporation, foreign limited partnership, or foreign limited liability company authorized to transact business in this State because its real name is unavailable.

(c) A person may apply to the Secretary of State for authorization to use a name that is not distinguishable upon the Secretary of State's records from one or more of the names described in subsection (b) of this section. The Secretary of State shall authorize use of the name applied for if:

(1) The other person who has or uses the name or who has reserved or registered the name consents to the use in writing and submits an undertaking in a form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applicant; or

(2) The applicant delivers to the Secretary of State a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) The use of assumed names or fictitious names, as provided for in Chapter 66 of the General Statutes, is not affected by this Chapter.

(e) Neither the reservation nor registration of a name, the organization of a limited liability company, nor the obtaining by a foreign limited liability company of a certificate of authority shall authorize the use in this State of a name in violation of the rights of any third party under the federal trademark act, the trademark act of this State, or other statutory or common law, or be a defense to an action for violation of those rights.

(f) The name of a limited liability company dissolved under G.S. 57C-6-03 may not be used by another limited liability company until the expiration of two years after the effective date of the dissolution unless the dissolved limited liability company changes its name to a name distinguishable upon the records of the Secretary of State from the names of other limited liability companies, business corporations, nonprofit corporations, or limited partnerships organized or transacting business in this State. (1993, c. 354, s. 1; 1995, c. 351, s. 3; c. 539, s. 33.)

Effect of Amendments. — Session Laws 1995, c. 351, s. 3, effective October 1, 1995, inserted "or" preceding "common law," and substituted "those rights" for "any such rights" at the end of subsection (e).

Session Laws 1995, c. 539 s. 33, effective July 29, 1995, and applicable to names filed, reserved, or registered on or after July 29, 1995, rewrote subsection (f).

Part 4. Registered Office and Registered Agent.

§ 57C-2-41. Change of registered office or registered agent.

(a) A limited liability company may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

(1) The name of the limited liability company;

(2) The street address, and the mailing address if different from the street address, of the limited liability company's current registered office, and the county in which it is located;

(3) If the address of the limited liability company's registered office is to be changed, the street address, and the mailing address if different from the street address, of the new registered office, and the county in which it is located;

(4) The name of its current registered agent;

(5) If the current registered agent is to be changed, the name of the new registered agent and the new registered agent's written consent (either on the statement or attached to it) to the appointment; and

(6) That after the change or changes are made, the addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the address of his business office, he may change the address of the registered office of any limited liability company for which he is the registered agent by notifying the limited liability company in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement that complies with the requirements of subsection (a) of this section; and recites that the limited liability company has been notified of the change.

(c) A limited liability company may change its registered office or registered agent by including in its annual report required by G.S.

57C-2-23 the information and any written consent required by subsection (a) of this section. (1993, c. 354, s. 1; 1995, c. 351, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added subsection (c).

ARTICLE 3.

Membership and Management.

Part 1. Membership.

§ 57C-3-01. Admission of members.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

§ 57C-3-02. Cessation of membership.

Unless otherwise provided in this Chapter, the articles of organization, or a written operating agreement, a person who has ceased to be a member shall have only the rights of an assignee as provided in G.S. 57C-5-02, but shall not be released from his liability to the limited liability company under G.S. 57C-4-02 (liability for contribution) and G.S. 57C-4-07 (liability upon wrongful distribution). A person ceases to be a member of a limited liability company upon the happening of any of the following events of withdrawal:

(1) The person's voluntary withdrawal from the limited liability company as provided in G.S. 57C-5-06;

(2) The person's removal as a member in accordance with the articles of organization or an operating agreement;

(3) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, the person's:

  a. Making an assignment for the benefit of creditors;

  b. Filing a voluntary petition in bankruptcy;

  c. Being adjudged bankrupt or insolvent or having entered against him an order for relief in any bankruptcy or insolvency proceeding;

  d. Filing a petition or answer seeking for him any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;

  e. Seeking, consenting to, or acquiescing in, the appointment of a trustee or receiver for, or liquidation of the member or of all or any substantial part of his properties; or

  f. Filing an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the person in any proceeding described in this subdivision;

(4) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all

other members, the continuation of any proceeding against the person seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, for 120 days after the commencement thereof or the appointment of a trustee, receiver, or liquidator for the person or all or any substantial part of the person's properties without the person's agreement or acquiescence, which appointment is not vacated or stayed for 120 days or, if the appointment is stayed, for 120 days after the expiration of the stay during which period the appointment is not vacated;

(5) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member who is an individual, the individual's:
  a. Death; or
  b. Adjudication by a court of competent jurisdiction as incompetent to manage his person or property;

(6) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member who is acting as a member by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(7) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member that is a domestic or foreign partnership, a domestic or foreign limited partnership, or another domestic or foreign limited liability company, the dissolution and commencement of winding up of the partnership, limited partnership, or limited liability company;

(8) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member that is a domestic or foreign corporation, the dissolution of the corporation or the revocation of its charter; or

(9) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member that is an estate, the distribution by the fiduciary of the estate's entire interest in the limited liability company. (1993, c. 354, s. 1; 1995, c. 351, ss. 5, 6.)

Effect of Amendments. — Session Laws 1995, c. 351, ss. 5 and 6, effective October 1, 1995, in subdivision (7) substituted "domestic or foreign partnership, a domestic or foreign limited partnership" for "partnership" following "of a member that is a", inserted "domestic or foreign" preceding "limited liability company", and inserted "limited partnership" preceding "or limited liability company"; and in subdivision (8) inserted "domestic or foreign" following "member that is a".

Part 2. Managers.

§ 57C-3-21. Qualification, designation, and removal of managers.

Subject to G.S. 57C-3-20(a), the articles of organization or a written operating agreement may set forth the number and qualification of managers and the manner in which they are to be designated, removed, and replaced. Unless otherwise provided in the articles of organization, a written operating agreement, or this Chapter:

(1) Managers need not be members and, unless otherwise required by G.S. 57C-3-20(a), members need not be managers;

(2) Designation of managers (other than those managers who are such by virtue of their status as members) shall be evidenced in a written operating agreement, as amended from time to time;

(3) Upon designation as manager in a written operating agreement and the person's consent to such designation, the designated person shall serve as manager until the earliest to occur of (i) the person's resignation, (ii) any event described in G.S. 57C-3-02 with respect to the manager, (iii) any event specified in the articles of organization or written operating agreement that results in a manager ceasing to be a manager, or (iv) the amendment of the written operating agreement removing the person's designation as a manager. (1993, c. 354, s. 1; 1995, c. 351, s. 7.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "G.S. 57C-3-02" for "G.S. 57C-3-02(3)" in subdivision (3).

Part 3. Liability.

§ 57C-3-32. Limitation of liability of managers and members and permissive indemnification of managers and members; insurance.

(a) Subject to subsection (b) of this section, the articles of organization or a written operating agreement may:

(1) Eliminate or limit the personal liability of a manager for monetary damages for breach of any duty provided for in G.S. 57C-3-22 (other than liability under G.S. 57C-4-07); and

(2) Provide for indemnification of a manager or member for judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which the member or manager is a party because he is or was a manager or member. For purposes of this subdivision, the words "expenses", "proceeding", and "party" shall have the meanings set forth in G.S. 55-8-50(b).

(b) No provision permitted under subsection (a) of this section shall limit, eliminate, or indemnify against the liability of a manager for (i) acts or omissions that the manager knew at the time of the acts or omissions were clearly in conflict with the interests of the limited liability company, (ii) any transaction from which the manager derived an improper personal benefit, or (iii) acts or omissions occurring prior to the date the provision became effective, except that indemnification pursuant to subdivision (2) of subsection (a) of this section may be provided if approved by all the members. As used in this subsection, "improper personal benefit" does not include reasonable compensation or other reasonable incidental benefit for or on account of service as a manager, an officer, an employee, an independent contractor, an attorney, or a consultant of the limited liability company.

No provision permitted under subsection (a) of this section shall limit or eliminate the liability of a member or manager for any taxes owed by the limited liability company under Chapter 105 of the General Statutes or Article 3 of Chapter 119 of the General Statutes.

(c) A limited liability company may purchase and maintain insurance on behalf of an individual who is or was a manager, an employee, or an agent of the limited liability company, or who, while a manager, an employee, or an agent of the limited liability company is or was serving at the request of the limited liability company as a director, an officer, a partner, a manager, a trustee, an employee, or an agent of a person, against liability asserted against or incurred by him in that capacity or arising from his status as a manager, an employee, or an agent, whether or not the limited liability company would have the power to indemnify him against the same liability under any provision of this Chapter. (1993, c. 354, s. 1; 1995, c. 351, ss. 8, 9.)

Effect of Amendments. — Session Laws 1995, c. 351, ss. 8 and 9, effective October 1, 1995, deleted "If approved by all the members" from the beginning of subdivision (a)(2); and inserted "except that indemnification pursuant to subdivision (2) of subsection (a) of this section may be provided if approved by all the members" at the end of the first sentence in subsection (b).

ARTICLE 4.

Finance.

§ 57C-4-01. Contributions to capital.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

ARTICLE 5.

Assignment of Membership Interests; Withdrawal.

§ 57C-5-01. Nature of membership interest.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

§ 57C-5-07. Distribution upon withdrawal.

Except as provided in this Article, upon withdrawal, any withdrawing member is entitled to receive any distribution to which he is otherwise entitled under the articles of organization or a written operating agreement, or, if not otherwise provided in the articles of organization or a written operating agreement, upon a reasonable time after withdrawal, the fair value of the member's interest in the limited liability company as of the date of withdrawal based upon the member's right to share in distributions from the limited liability company. (1995, c. 351, s. 10.)

Editor's Note. — Session Laws 1995, c. 351, s. 22, made this section effective October 1, 1995.

Article 6.

Dissolution.

§ 57C-6-01. Dissolution.

A limited liability company is dissolved and its affairs shall be wound up at or upon the first to occur of the following:

(1) The time specified in the articles of organization or a written operating agreement;

(2) The happening of an event specified in the articles of organization or a written operating agreement;

(3) The written consent of all members;

(4) Unless otherwise provided in the articles of organization or a written operating agreement, the happening of any event of withdrawal described in G.S. 57C-3-02 (cessation of membership) with respect to any member, unless at the time of the event of withdrawal (i) there is at least one remaining member, (ii) the provisions of the articles of organization or a written operating agreement permit the business of the limited liability company to be carried on by the remaining member or members, and (iii) the remaining member or members elect to do so pursuant to such vote, to procedures prescribed in the articles of organization or a written operating agreement, or, in the absence of prescribed voting requirements or procedures, by a unanimous vote of the remaining member or members taken after the event of withdrawal. The foregoing to the contrary notwithstanding, a limited liability company shall not be dissolved and is not required to be wound up by reason of any event of withdrawal if, within 90 days after the event of withdrawal, all remaining members agree in writing that the business of the limited liability company may be continued; or

(5) Entry of a decree of judicial dissolution under G.S. 57C-6-02, or the filing by the Secretary of State of a certificate of dissolution under G.S. 57C-6-03. (1993, c. 354, s. 1; 1995, c. 351, s. 12.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, deleted "and the person or persons with respect to whom the event of withdrawal has occurred (or his successor)" preceding "agree in writing" in the last sentence of subdivision (4).

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

§ 57C-6-02. Judicial dissolution.

(a) On application by or for a member, the court may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or an operating agreement. The clerk of court shall deliver a certified copy of the decree to the Secretary of State, who shall file it.

(b) Venue for a proceeding under subsection (a) of this section to dissolve a limited liability company lies in the county where the limited liability company's principal office (or, if none in this State, its registered office) is or was last located. (1993, c. 354, s. 1; 1995, c. 351, s. 11.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the last sentence in subsection (a).

ARTICLE 7.

Foreign Limited Liability Companies.

§ 57C-7-01. Law governing.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

ARTICLE 8.

Derivative Actions.

§ 57C-8-01. Members' derivative actions.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

ARTICLE 9.

Merger.

§ 57C-9-01. Merger.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

ARTICLE 10.

Miscellaneous.

§ 57C-10-01. Execution by judicial act.

Legal Periodicals. — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1995

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1995 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
Attorney General of North Carolina

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

November 1, 1999

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1999 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Michael F. Easley

Attorney General of North Carolina